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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHARLES McDOWELL,
ED FOSSETT, and
SAM SERRAGLIO, - - - - - Petitioners,

versus

ROBERT BARNES, - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a federal circuit court of appeals apply an *England* reservation *sua sponte* to sustain the vitality of a 42 U.S.C. 1983 action which is otherwise barred by state doctrines of preclusion?

2. Is an *England* reservation valid if the individual first files his claim in state court?

3. Does the doctrine of claim preclusion (res judicata) prohibit an individual from subsequently litigating a constitutional issue in federal court if it was not raised in his state court case?

4. Does the doctrine of issue preclusion (collateral estoppel) require dismissal of an individual's 42 U.S.C. 1983 case in federal court if the state court upheld his dismissal for just and substantial cause?

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No.

IN THE

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October Term, 1988

CHARLES MCDOWELL,
ED FOSSETT, and
SAM SERRAGLIO, - - - - - *Petitioners,*

v.

ROBERT BARNES, - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Charles McDowell, Ed Fossett, and Sam Serraglio, respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on June 7, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 848 F. 2d 725 (6th Cir. 1988), and is reprinted in the Appendix hereto, p. 1a, *infra*.

The memorandum opinion and order of the United States District Court for the Eastern District of Kentucky (Bertelsman, D.J.) is reported at 647 F. Supp. 1307 (1986), and is reprinted in the Appendix hereto, p. 23a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. 1983, the respondent brought this suit in the Eastern District of Kentucky. On November 6, 1986, the Eastern District granted petitioners' motion for summary judgment. (App. pp. 23a-33a.)

On respondent's appeal, the Sixth Circuit on June 7, 1988, entered a decision reversing the Eastern District's Order and remanding the case for further consideration (App. pp. 1a-22a). A petition for rehearing was denied on August 4, 1988.

The jurisdiction of this Court to review the judgment of the Sixth Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Respondent, Robert Barnes, was employed by the Kentucky Department for the Blind. On March 18, 1982, he was suspended from his job pending an investigation of sexual harassment allegations. Subsequently, an investigation was conducted by petitioners Ed Fossett (a lawyer employed by the State) and Sam Serraglio (the Personnel Officer for the Department for the Blind). The investigation resulted in the conclusion that Mr. Barnes was guilty of sexual harassment and unsatisfactory performance of his duties, and on April 30, 1982, he was discharged. Following the dismissal by petitioner Charles McDowell (the Executive Director of the Department for the Blind), Mr. Barnes appealed his dismissal to the Kentucky Personnel Board.

The Board held a lengthy hearing and concluded that Mr. Barnes was guilty of sexual harassment and unsatisfactory work performance (including intentionally deceiving a superior). Personnel Board Order, App. pp. 34a-65a. Before the Board, Mr. Barnes did not directly raise his First Amendment argument, that is, that the motivating factor behind his dismissal was his alleged criticism of the Department for the Blind and Mr. McDowell. He raised the issue obliquely, intimating that there were "political" reasons for his dismissal. However, his primary defense was that he was not guilty of sexual harassment or unsatisfactory work performance.

Mr. Barnes appealed the Board's order to the Franklin Circuit Court in Frankfort, Kentucky, which affirmed; to the Kentucky Court of Appeals, which also affirmed; and to the Kentucky Supreme Court, which denied review.

One month after he filed his appeal of the Board's order with the Franklin Circuit Court, Mr. Barnes filed a 42 U.S.C. 1983 suit in the United States District Court in Frankfort, Kentucky. In that suit, he specifically alleged that his dismissal was motivated by the exercise of his First Amendment rights.

Approximately seven months later, the petitioners filed a motion for summary judgment. Mr. Barnes responded with a motion to hold his motion for summary judgment in abeyance. The District Court granted Mr. Barnes' motion.

After the Kentucky Supreme Court denied review, Mr. Barnes moved for a trial in the United States District Court. The petitioners renewed their motion for summary judgment. They based their motion on the application of the State's doctrines of preclusion to federal courts. The Federal District Court granted summary judgment for the petitioners. The District Judge based his decision on issue preclusion since Mr. Barnes was "justly dismissed for good cause arising out of his sexually harassing a female employee" as determined conclusively by the Kentucky Courts. District Court Order, App. p. 28a.

Mr. Barnes appealed to the United States Court of Appeals for the Sixth Circuit. That Court reversed the lower court. The Sixth Circuit held that claim preclusion did not apply since different causes of action were involved. It held that issue preclusion related only to the issue of Mr. Barnes being guilty of sexual harassment. Such preclusion, the court reasoned should not foreclose Mr. Barnes from arguing in the Federal Courts that his dismissal was motivated by the exercise of his First Amendment rights, *if he had not presented that argument to the State Courts.*

At no time during the pendency of his federal court proceedings did Mr. Barnes make an *England* [v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)] reservation.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's Findings That the Respondent Permissibly Split His Cause of Action for Unjust Dismissal By Filing Separate Cases Initially in State Court and Subsequently in Federal Court in the Circumstances Presented (a) Effectively Overrules This Court's Decision in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), (b) Conflicts With Decisions of This Court and Federal Circuit Courts of Appeal on Preclusion Doctrines, and (c) Misapplies Kentucky Law on the Doctrine of Claim Preclusion.

It was respect for the litigant's choice of forum which engendered the *England* reservation. *England* v. *Louisiana-State Bd. of Med. Exam.*, 375 U.S. 411, 415, 84 S. Ct. 461, 464 (1964).

This Court in *England* was presented with petitioners who initiated a claim challenging the application of a state statute in the Federal District Court for the Eastern District of Louisiana. That Federal Court abstained and sent the petitioners back for a state court adjudication on the issues presented. When the state court disposition did not uphold the petitioners' position, they returned to the Federal Court which retained jurisdiction and which held them precluded from relitigating the issues. Recognizing that a litigant who has properly invoked the jurisdiction of a federal district court to consider federal constitutional claims should not be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims, this Court

crafted the England reservation. 375 U.S. at 415, 84 S. Ct. at 464.

Hence, a properly invoked England reservation modifies the doctrine of claim preclusion. However, the Sixth Circuit's *sua sponte* invocation of an England reservation on the respondent's behalf violates the intent of this Court by nullifying the doctrine of claim preclusion.

The concern of this Court in *England* was to protect litigants' choice of a federal factfinding on their claims. Taking an England reservation enables the litigant to bring his claim before the federal court to construct a record and make findings of fact. 375 U.S. at 416, 84 S. Ct. at 465. This Court sought to protect litigants from finding themselves remitted to state tribunals by federal courts and thereby unwillingly deprived of a federal factfinding by the doctrines of preclusion. *Id.* at 417, 465.

The key consideration for the purposes of the case at bar is that an England reservation preserves the litigant's right *to return to federal court* although state ~~court proce~~edings are pursued after the federal court action is initiated. However, the England reservation cannot create a second forum in the federal system when the litigant has made his initial election for a state forum. The England reservation is not a procedural mechanism permitting a split in a cause of action which would be repugnant to established doctrines of preclusion. "In accord with the *England* decision, an independent federal determination of the facts prob-

ably should be available to a plaintiff who has properly invoked federal jurisdiction before filing a state action and who has taken no substantial steps in the state action before abstention is ordered." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure,* § 4471, at 315 (1988 Supp.).

However, the case at bar is not in such a posture. Respondent did not initially seek a federal court fact-finding on his unjust dismissal claim. Respondent on his own motion sought an abeyance by the federal court. Respondent took substantial steps in the state proceedings during and after obtaining an abatement in federal court. Respondent at no time in the state proceedings exercised an England reservation or advised the state courts of his constitutional claims. In fact, respondent alleged constitutional claims in federal court only after his state action was in the first level of review. Yet the Sixth Circuit's decision interprets respondent's action as a valid England reservation.

The Sixth Circuit relied on its decision in *Wicker* v. *Board of Educ. of Knott County,* KY, 826 F. 2d 442 (6th Cir. 1987) as dispositive in the instant action. However, the procedural posture in *Wicker* — as in *England* — is distinguishable. The *Wicker* plaintiff's initial preference for a federal forum deserved respect. A former school superintendent brought the action in federal district court alleging that school board members had infringed upon his constitutional rights in violation of Section 1983 by removing him from office

in reprisal for protected political activity. He subsequently filed an action in state court. Before the state court took any action, the federal court abstained and Wicker filed an express reservation of federal issues — an England reservation — in Knott County Circuit Court and limited his state suit to issues of state law including interpretation and application of state statutes. *Id.* at 444-445.

The Sixth Circuit in *Wicker* summarily disagreed with the appellees' arguments that *England* should apply only where a party has been forced into state court. 826 F. 2d at 445. However, as cited by the appellees in *Wicker, Id.* at 446, other circuits have been more receptive to that reasoning. See, *Roy* v. *Jones,* 484 F. 2d 96, 101 (3rd Cir. 1973) limited by *New Jersey Educ. Ass'n* v. *Burke,* 579 F. 2d 764, 774 n. 52 (3rd Cir. 1978); *Henry* v. *First National Bank of Clarksdale,* 595 F. 2d 291, 298 n. 1 (5th Cir. 1979).

Additionally, the Sixth Circuit recognized that there was disagreement between the federal circuit courts on "whether an England reservation is valid if the plaintiff first files in state court." *Wicker,* 826 F. 2d at 447 n. 4.[1] However, the Court declined to

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[1]See *Oler* v. *Trustees of California State University and Colleges,* 80 F.R.D. 319, 321 (N.D. Cal. 1978) ("*England* does not control where plaintiff himself initially seeks relief in the state court, particularly where . . . plaintiff unreservedly raises his federal constitutional claims in the state court."); *Gresham Park Community Organization* v. *Howell,* 652 F. 2d 1227, 1243 n. 48

(Footnote Continued on Next Page)

address the question since Wicker did not initially seek relief in state court. "This is not a situation where a party is properly barred from further litigation after first filing a reservation in state court and then proceeding to federal court after a state court decision on the merits." *Wicker*, 826 F. 2d. at 447 (citations omitted.)

Yet when presented with the opportunity to make a reasoned determination of its position on that question in the case at bar, the Sixth Circuit summarily pronounced that, "by splitting on his own initiative the state and federal actions stemming from his discharge, Barnes achieved the very same effect that he would have had he made an England reservation." Sixth Circuit Decision, App. p. 15a. Petitioners respectfully submit that this splitting of actions is strictly proscribed by the full faith and credit statute and preclusion doctrines which cannot be circumvented through a *sua sponte* application of the England reservation by a federal court.[2]

In the case at bar, respondent's initial preference for a competent state forum does not compel independent federal factfinding. If the respondent had

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(5th Cir. 1981); *Tovar* v. *Billmeyer*, 609 F. 2d 1291, 1293-94 (9th Cir. 1980); *New Jersey Educ. Association* v. *Burke*, 579 F. 2d 764, 774 n. 52 (3d Cir. 1978).

[2]Cases decided since *England* "uniformly have not allowed a plaintiff to return to federal court if he does not reasonably inform the state court of outstanding federal issues." *Wicker*, 826 F. 2d at 446 (citations omitted).

wanted a federal factfinding on his unjust dismissal claim he needed only to initiate his claim in the federal court. He could have prosecuted his unjust dismissal with its allegations of violative retaliatory discharge in that forum. There would have been no occasion for the federal court to defer to a state court resolution. The respondent's choice of forum would have been honored.

However, the respondent—as was his right—elected a state forum in which to initiate his unjust dismissal claim. It was only after having pursued and obtained an adverse state factfinding that respondent sought another factfinding in federal court. Respondent now alleges that the "real" reason for his dismissal was his exercise of constitutionally protected free speech and asserts his right to a second factfinding this time in federal court. This procedural maneuvering is prohibited by the doctrines of preclusion and flies in the face of the public policy underlying those doctrines.

Choice of forum is likewise at the heart of the preclusion doctrines. Claim preclusion (the designation by the RESTATEMENT (SECOND) OF JUDGMENTS (1984) for the traditional legal label of res judicata) refers to the effect of a judgment in foreclosing litigation of a matter that has never been litigated because of the determination that it should have been advanced in an earlier suit. The preclusion doctrines presuppose a system in which litigants are free to sue at the time and in the forum of their choice. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 395, 401-09 (1981).

Pursuant to 28 U.S.C. section 1343(3) (1982), state and federal courts have concurrent jurisdiction for Section 1983. Thus a litigant is free to choose either a federal or state judicial forum. Comment, "Gaining Access to a Federal Forum: The Preclusive Effect of Unreviewed Administrative Determinations in Section 1983 Actions," 9 U. Hawaii L. Rev. 643, 660 n. 82 (1987).

While reserving this choice of forum for the claimant, the courts have recognized that interests of comity, judicial economy, and finality require that there be only one bite of the judicial apple. *Moore* v. *Bonner*, 695 F. 2d 799, 802 (4th Cir. 1982). "It seems inequitable to allow the plaintiff to make his choice of forum more than once during the course of the litigation." Note, "Consequences of Federal Abstention," 73 Harv. L. Rev. 1358, 1365 n. 48 (1960) (quoting *Lassiter* v. *Northhampton County Bd. of Elections*, 360 U.S. 45 (1959).

A claimant is entitled to proceed in either state or federal court. Once the election is made, the claimant cannot split his cause of action on the same claim between federal and state courts. The choice of whether to pursue review of an agency determination in state court or to seek a de novo trial in federal court should be the claimant's. *Mitchum* v. *Foster*, 407 U.S. 225 (1972). "If a plaintiff chooses state judicial review of the administrative agency decision, the judgment of the court has preclusive, binding effect. It should be the plaintiff's choice though, to forego this review

and proceed with a trial de novo in federal court." Comment, 9 Univ. Hawaii L. Rev. at 673.

Having seen that respondent did not properly preserve his right to a federal forum through an England reservation, traditional doctrines inform us that respondent is precluded from obtaining a federal forum for his Section 1983 claim. There is no question that respondent could have brought his constitutional claim in the state proceedings. In fact, the efficacy of state court adjudication of federal rights has been increasingly recognized by the Supreme Court. *Allen* v. *McCurry*, 449 U.S. 90, 99, 101 S. Ct. 411 (1980). In *Allen*, the Court rejected the argument that every litigant claiming a constitutional violation is entitled to an opportunity to present the claim in federal court. *Id.*

What every litigant is entitled to is an opportunity for a full and fair hearing on his claim. To that end, a party is entitled to his choice of forum for that full and fair hearing. The Court asserted that the federal courts must recognize "fair procedures" of the state courts and trust the state courts to correctly decide constitutional issues. *Allen*, 449 U.S. at 99. So long as the party had a "full and fair opportunity to litigate," federal courts must give preclusive effect to prior judgments. *Id.*

Section 1983 is not an exception to 28 U.S.C. 1738 which requires a federal district court to give the same full faith and credit to judicial proceedings as they would have in state court. U.S. Const. Art. 4, Section 1; *Fowler* v. *City of Louisville*, 625 F. Supp. 181, *aff'd*

803 F. 2d 719, *cert. denied*, 107 S. Ct. 1375 (W.D. Ky. 1985). This Court has rejected the argument that civil rights claims could be implied exceptions to an application of full faith and credit in federal court. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 102 S. Ct. 1883 (1981).

The *Kremer* decision is on point as this Court held that preclusion arises if an administrative decision is affirmed through the process of state judicial review. The Supreme Court cited Section 1738 as authority for the conclusion that the federal courts must give the same preclusive effect to a judgment as the state from which it came. 456 U.S. at 466; 102 S. Ct. at 1889. Under the applicable state law, Kremer was precluded from bringing a lawsuit in state court under Title VII alleging employment discrimination on the basis of national origin and religion because the state court of appeals had affirmed the agency decision of discharge and refused to rehear and Kremer did not pursue further appeal at the next state level. The Supreme Court concluded that Section 1738 precluded Kremer from a similar action in federal court because the state court affirmance was a "judgment" that merited full faith and credit. *Id.* The Court applied *Allen* in acknowledging that the due process clause of the Fourteenth Amendment is a procedural limitation on state courts when applying Section 1738 or when otherwise creating an exception to the usual preclusion requirements. The federal court cannot conduct a de novo review of a state court decision which has been rendered follow-

ing a proceeding which comports with constitutional due process guarantees.

Thus, reviewed state administrative actions rise to the level of a judgment to be afforded full faith and credit in federal court on subsequent federal civil rights claim. *University of Tenn.* v. *Elliott,* 106 S. Ct. 3220 (1986). This Court in *Elliott* precluded a federal trial on a Section 1983 claim stemming from a state administrative proceeding which had been reviewed in the state courts *at the plaintiff's election.* One commentator interprets that decision as the Supreme Court's reaffirmation of federal-state comity. Comment, 9 U. Hawaii L. Rev. at 665. "The rules regarding preclusion are not mere procedural technical relics of the common law, and at the most basic level, preclusion of claims serves both the interest of the parties and public policy." *Id.* at 654.

Another eminent legal authority, recognizing the continued vitality of preclusion principles, has stated that "suits under the civil rights acts clearly should not justify a direct attack on a state judgment merely because possible constitutional defenses were omitted from the state action." Wright, *supra,* section 4471, at 717. The Supreme Court has held unequivocally that state court judgments have the same claim preclusive effect in federal courts that the judgment would have in the state courts. *Migra* v. *Warren City School District Board of Education,* 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984).

In *Migra,* the petitioner was employed by the respondent school board. During the year, her contract was terminated. She sued in state court alleging breach of contract and wrongful interference with a contract of employment. She was successful on these causes of action. Thereafter, she filed an action in federal district court alleging violation of her constitutional rights, including an attempt to punish her for the exercise of her First Amendment rights. She sued under 42 U.S.C. 1983.

This Court held that the state court judgment was entitled to the same claim preclusive effect in federal court as it would have in state courts. The Court remanded the case to the district court to interpret and apply the applicable state law.

In *Migra,* the Court specifically rejected a plea to allow state claims to be raised in state court and federal claims to be raised in federal court. *Id.* at 84. The Court held that such a system was not the one established by the Constitution's Full Faith and Credit Clause (Art. IV, 1) and its implementing statute, 28 U.S.C. 1738.

As respondent at bar, the petitioner in *Migra*

> "did not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court. Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state

> court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts." 465 U.S. at 84-85, 104 S. Ct. at 898.

Hence, the claim preclusive effect of a state court judgment in a subsequent action under Section 1983 must be measured by state law.

It is clear under Kentucky law that respondent is barred by state preclusion doctrines from proceeding with his Section 1983 action. Kentucky courts would hold that claim preclusion forecloses an action to assert constitutional challenges to a state court judgment upholding respondent's dismissal on the grounds that the challenges should have been made in the state court proceedings. Therefore, the same constitutional challenges are precluded in a Section 1983 action in federal court.

By misapplying Kentucky law, the Sixth Circuit has allowed precisely that to happen. Respondent will have been able to raise his state claims in state courts and his federal claims in federal court, absent an England reservation. At the very least, the Sixth Circuit should have remanded the case to the district court to interpret and apply Kentucky law on this question, as this Court did in *Migra*. However, even a brief review of Kentucky law will make it clear that the Sixth Circuit should have affirmed the district court's dismissal.

As in *Migra,* the key to applying the doctrine of claim preclusion in a determination of what constitutes a cause of action. The general rule of claim preclusion is that it applies not only to matters which were actually raised but to any other matters which could have been raised and "which properly belonged to the subject of litigation," *Hays* v. *Sturgill,* 302 Ky. 31, 193 S.W. 2d 648, 650 (1946), since a cause of action may not be split and tried piecemeal. *Egbert* v. *Curtis,* 695 S.W. 2d 123 (Ky. Ct. App. 1985).

If Mr. Barnes had only one cause of action, then he should have brought his constitutional arguments in state court. Otherwise, claim preclusion could bar him from raising them in federal court for the first time. *Migra, supra.*

In a petition for rehearing it was argued to the Sixth Circuit that these two cases are the same cause of action. The Sixth Circuit rejected this argument. In Kentucky, identical causes of action involve the same parties and the same subject matter. *Stephens* v. *Goodenough,* 560 S.W. 2d 556 (Ky. 1977). They are the same causes of action if the same evidence would sustain both. *Jackson* v. *Pepper Gasoline Co.,* 284 Ky. 175, 144 S.W. 2d 212 (1940).

Even the Sixth Circuit itself, in another case, has recognized this. In *Serra* v. *Pichardo,* 786 F. 2d 237 (6th Cir. 1986), the court held when two claims arise out of the same act and events, they present identical causes of action. In *Serra,* a former federal prisoner's judgment against the U.S. Government for the negli-

gence of the prison doctor and warden in treating his arterial occlusion barred his constitutional claim against the doctor and warden in treating the disease.

Yet the Sixth Circuit declined to apply the Kentucky doctrine of claim preclusion because it characterized the action at issue as a different cause of action from the prior state proceedings. Sixth Circuit Decision, App. p. ..a. Kentucky courts have long held "the best and most accurate test as to the identity of causes of action is whether the same evidence would sustain both." *Jackson*, 144 S.W. 2d at 214. Respondent's Section 1983 claim implicates the same factual analysis pertaining to the conduct of the employee (respondent) and the conduct and motivation of the employer (petitioners). Therefore, Mr. Barnes' state claim of unjust dismissal is identical to his federal constitutional claim which, in essence, also claims unjust dismissal. The only differences are the alleged reasons for the dismissal. This does not amount to separate causes of action.

Since Mr. Barnes' federal case is the same cause of action he initiated and had reviewed through state court, under Kentucky law it is precluded. "The rule of res adjudicata (sic) is that a question or a fact which could have been or might have been litigated in a previous action cannot thereafter be re-litigated by the same parties or those in privity with them. This includes every matter which was offered and received or might have been admitted to sustain or defeat the claim or demand," *Jackson*, 144 S.W. 2d at 214.

With the exception for fraud, concealment, or misrepresentation—none of which respondent has alleged —a party cannot avoid application of claim preclusion for failure to include a claim in the former action prosecuted to finality. *Harnett* v. *Billman*, 800 F. 2d 1308, *cert. denied* 107 S. Ct. 1571 (4th Cir. 1986). Public policy requires an end of litigation and hardship on an individual vexed twice for the same cause of action. *Barnett* v. *Commonwealth*, 348 S.W. 2d 834 (Ky. 1960).

This concern for finality underlying preclusion doctrines is particularly jeopardized by the Sixth Circuit's decisions permitting litigants two bites of the judicial apple. Imposing an England reservation on an action which clearly omitted any of the procedural prerequisites for such a reservation, the Sixth Circuit has effectively overruled the Supreme Court decision in *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461 (1964). By preserving the respondent's right to proceed in federal court on a claim initiated, reviewed, and decided in the state courts, the Sixth Circuit contravenes the tenets of the venerable preclusion doctrines.

II.

The Interplay of *Allen* v. *McCurry* and the *Mt. Healthy City School District Board of Education* v. *Doyle* Should Have Sustained the District Court's Decision on Issue Preclusion.

Allen v. *McCurry*, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 441 (1980) held that the doctrine of issue

preclusion applies to 42 U.S.C. 1983 actions; that is, an issue decided in state court has preclusive effect in a subsequent action in federal court. In Mr. Barnes' case, the district court and the Sixth Circuit held that the fact that Mr. Barnes was guilty of sexual harassment may not be relitigated in federal court since this issue was decided conclusively, based on substantial evidence, by the state courts. The district court and the Sixth Circuit disagreed, however, on the application of this decision to the federal court action.

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 87 S. Ct. 568 (1977) set out a three-part test for Section 1983 actions. As applied to Mr. Barnes' case, the test is as follows:

(1) Was Mr. Barnes' conduct constitutionally protected?

(2) Was Mr. Barnes' conduct the motivating factor in the decision to dismiss him?

(3) Would the employer have reached the same decision to dismiss even in the absence of the protected conduct? The employer must show this by a preponderance of the evidence.

In this case, Mr. Barnes has yet to prove parts (1) and (2) of the test. However, the district court, applying the holding of the *Allen* case, held that part (3) of the *Mt. Healthy* test had been satisfied. Thus, there was no need to go through parts (1) and (2).

This interplay between *Allen* and *Mt. Healthy* is essential to fulfill the very reasons for the application of the doctrine of issue preclusion—to reduce unnecessary litigation and to promote comity between state and federal courts. An issue that, under *Mt. Healthy*, would be ultimately conclusive should act to bar further litigation in federal court. The employer here has professed a reason for Mr. Barnes' dismissal. That reason was proven by substantial evidence not just by a preponderance of the evidence. It is a reason that has been universally recognized to be more than adequate grounds for dismissal of an employee. See Note, "Employer Liability Under Title VII for Sexual Harassment after *Meritor Savings Bank* v. *Vinson*," 87 Colum. L. Rev. 1258 (1987). Consequently, reading *Allen* and *Mt. Healthy* together, the district court was correct in dismissing Mr. Barnes' federal action.

CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted to correct the apparent conflict between the decision below and the decisions of this Court, of Federal Circuit Courts of Appeal, and other State Courts of last resort cited herein.

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APPENDIX

RECOMNENDED FOR FULL TEXT PUBLICATION
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Nos. 86-6261 / 87-5776

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT BARNES (86-6261) and
JOE THOMPSON (87-5776), - - *Plaintiffs-Appellants,*

v.

CHARLES MCDOWELL,
ED FOSSETT, and
SAM SERRAGLIO, - - - *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed June 7, 1988

Before: MILBURN and BOGGS, Circuit Judges; and ALDRICH, District Judge.*

BOGGS, Circuit Judge. Robert Barnes and Joe Thompson appeal the district court's decisions granting summary judgment in favor of defendants in their actions under 42 U.S.C. § 1983. Barnes and Thompson claim they were discharged in retaliation for having exercised their right to free speech. Upon review of the parties' briefs and the

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*The Honorable Ann Aldrich, District Judge for the United States District Court for the Northern District of Ohio, sitting by designation.

records, we conclude that the district court correctly awarded summary judgment in favor of defendants on Thompson's claim. However, the lower court erred in granting summary judgment in favor of defendants with respect to Barnes's claim.

Accordingly, we affirm the district court's decision in Thompson's appeal (No. 87-5776). We reverse the district court's decision in Barnes's appeal (No. 86-6261), and remand that case for further consideration of Barnes's section 1983 claim.

I

At the time he was discharged, Barnes was Director of the Business Enterprises Program of the Bureau for the Blind (the Bureau), a Kentucky agency within the state's Education and Humanities Cabinet. The Business Enterprises Program assists blind Kentucky residents with the operation of vending machine stands at offices and businesses throughout Kentucky. At the time he was discharged, Thompson was Training Officer and Supervisor of Repairs for the Bureau's Business Enterprises Program. His position made him responsible for purchasing supplies for the machines and for supervising repairs of the machines.

On March 18, 1982, defendant-appellee Charles McDowell, acting Director for the Bureau and the immediate superior of Barnes and Thompson, notified them in separate letters that they were suspended for thirty working days while the Bureau investigated a report that the men had sexually harassed Thompson's secretary, a blind female named Libby Williams. Defendant-appellee Ed Fossett, acting attorney for the Education and Humanities Cabinet, and defendant-appellee Sam Serraglio, acting Finance and Personnel Officer of the Bureau, conducted the investigation.

On April 30, 1982, McDowell notified Barnes and Thompson, again in separate letters, that they were discharged for having sexually harassed Libby Williams. Barnes also was accused of having harassed two other females associated with the Bureau. In addition to the sexual harassment charges, both men were accused of various deficiencies in their work performance, including allegations that the two had been inebriated while on the job and when socializing with vendor operators in the field. The letter stated that the men had ten working days to reply to McDowell about the charges.

On May 21, 1982, Barnes and Thompson appeared with counsel before McDowell. Fossett and Serraglio also were present. According to affidavits from Fossett and Serraglio, "Mr. McDowell confronted Mr. Barnes and Mr. Thompson with the charges against them and gave them an opportunity to refute, explain and otherwise address the charges." Apparently, Barnes's and Thompson's responses were inadequate, as McDowell adhered to his decision to discharge the men.

Barnes and Thompson then appealed their firings to the Kentucky Personnel Board. A hearing officer for the Personnel Board held an adjudicative hearing on the matter. Subsequently, the hearing officer issued his findings of fact, conclusions of law and recommended order. He found that Barnes had engaged in sexual harassment and upheld his dismissal on that ground.[1]

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[1]Although the hearing officer's findings of fact relate incidents where Barnes was present during times Libby Williams claimed she was harassed, the officer's conclusions of law only state that Barnes harassed Jeanne Pherson, another Bureau employee, and Anna Faye Katon, a blind vendor.

With regard to Thompson, the officer found that "technically" Thompson was not guilty of sexual harassment.[2] The officer further found that Thompson's work as the vending machine repair supervisor was satisfactory but that his performance of his duties as a training officer was "way below standard and a disservice to the trainees as well as to the Bureau." The officer concluded, "Here it is clear . . . that the appellant received one promotion too many, one that he could not handle. Joe was a great repairman and would be an asset to the Bureau if utilized as such, but he is not a training officer." Accordingly, the officer recommended that Thompson be reinstated but to a position other than training officer.

After considering the hearing officer's report, the state Personnel Board sustained the officer's findings of fact and conclusions of law, thereby upholding Barnes's discharge. The Board reduced Thompson's sanction from a discharge to the thirty-day suspension he already had served and ordered him reinstated to his former position or to a position "of like status and pay."

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[2]Before making this finding, the officer had stated:

> Joe could tell many dirty jokes or twist the meaning of an innocent remark so that it had sexual connotations. Sexual harassment? No. Why? The atmosphere at the Brownsboro Road office was such that the comments offended no one. A great number of employees engaged in this conduct, even Libby Williams. Joe never made physical advances on Libby and when she felt he was getting too personal verbally, she was able to tell him and he stopped. Many times Libby initiated the conversation and then Joe may have had to decide when it should cease.

Barnes sought judicial review of the Board's decision in state court.[3] The Board's decision was affirmed by a state trial court and on appeal on the ground that the decision to discharge Barnes for sexual harassment was supported by substantial evidence. The Kentucky Supreme Court denied review of the decision.

On March 17, 1983, while judicial review of Barnes's discharge still was pending in state court, Barnes and Thompson filed suit under 42 U.S.C. § 1983 in federal district court in Kentucky claiming that McDowell, with "the advice, encouragement, and assistance of Defendants Ed Fossett and Sam [Serraglio]" used the sexual harassment and unsatisfactory work allegations as a pretext for their discharge. In their complaint, Barnes and Thompson alleged that the real reason they were fired was in retaliation for having expressed, on various occasions, their opinions that certain Bureau practices under McDowell's supervision evidenced corruption and cronyism at the Bureau.[4]

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[3]Thompson did not appeal the Board's decision in state court.

[4]Specifically, Barnes and Thompson alleged in their complaint that they had complained.

1. That the vending facilities operated by blind vendors throughout Kentucky under the auspices of the Bureau for the Blind's Business Enterprises Program and commonly known as "blind stands" should be audited on a frequent and regular basis.

2. That the failure of the Bureau for the Blind to conduct regular and frequent audits of the "blind stands" allowed some of the vendors of these stands to underreport their actual earnings from the operation of their respective stands by a total of approximately $2,000,000 per annum; and that this underreporting should not be tolerated because it resulted in a loss to the Business Enterprises Program of a large sum of money in the form of man-

(Footnote Continued on Next Page)

On January 9, 1985, upon motion by the plaintiffs, the district court ordered that the federal litigation be held in abeyance until Barnes's appeals in the Kentucky courts were resolved.

After the Kentucky Supreme Court denied review of Barnes's discharge, Barnes and Thompson moved for a trial date in federal court. The defendants moved for summary judgment, arguing that the Board's decision against Barnes, and its affirmance in the state courts, con-

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(Footnote Continued From Preceding Page)

datory "set-aside" payments from the vendors and reflected poorly on the honest "blind stand" vendors.

3. That two blind vendors in particular, namely Faye Katon and Jerry Cameron, who are close personal friends of Defendant Charles McDowell, were grossly, openly, and notoriously underreporting their actual earnings as "blind stand" vendors to the Business Enterprises Program, and that this state of affairs brought the Business Enterprises Program and the blind vendors as a whole into disrepute and should not be tolerated.

4. That the Bureau for the Blind condoned or encouraged discrimination against totally blind individuals involved in the "blind stand" program in favor of partially blind individuals.

5. That the Defendant Charles McDowell failed to discipline inefficient and incompetent state employees or to support the Plaintiff Barnes in his efforts to discipline such workers.

6. That the Bureau for the Blind deserved higher appropriations from the General Assembly of Kentucky than it received or that Defendant McDowell was willing to request.

7. That the Defendant McDowell failed to investigate allegations of improper purchasing of parts for the repair of machines used in the Business Enterprises Program in violation of State government billing procedures.

stituted res judicata or collateral estoppel[5] of the federal action.

Barnes responded that the res judicata and collateral estoppel arguments were inapplicable to him because, among other reasons, neither the state board nor the state courts had made any finding regarding Barnes's contention

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[5]The Supreme Court has noted:

> [t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Migra v. *Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (citations omitted). Some commentators and court decisions have used the term "res judicata" as being "virtually synonymous with 'claim preclusion.'" *Ibid.*

In the proceedings attendant to these appeals, the parties and the district court appear to have adopted the position that "res judicata" is synonymous with "claim preclusion" and "collateral estoppel" is synonymous with "issue preclusion." At this stage of the litigation, we will not disturb this usage although we will, during the course of our discussion of the legal issues, use the terms "claim preclusion" and "issue preclusion." We also express our hope that future litigants, in the interests of precision and clarity, will formulate arguments which refer solely to issue or claim preclusion and which refrain from using the predecessors of those terms, whose meanings have become so convoluted.

that he was fired in retaliation for declaring that certain practices and individuals at the Bureau were corrupt. Barnes also contended that even if the Board's finding that he engaged in sexual harassment was given preclusive effect in federal court, a jury still could find that the motivating factor for his discharge was retaliation for his speech.

On September 17, 1986, the district court sustained the defendants' motion for summary judgment against Barnes's section 1983 claim in a non-final order. The court, however, did not dismiss Thompson's claim. Instead it ordered Thompson to file a memorandum addressing whether any issues resolved in the state administrative proceedings concerning his discharge had a preclusive effect upon his federal claim.

Thompson filed the requested memorandum. At the same time, Barnes moved the court to reconsider its September 17, 1986, order.

On November 6, 1986, the court denied Barnes's motion for reconsideration and made its dismissal of Barnes's claim a final and appealable order. The court stated that the state administrative and judicial proceedings already had determined "that [Barnes] was justly dismissed for good cause arising out of his sexually harassing a female employee." Consequently, the district court apparently concluded that Barnes was collaterally estopped from relitigating in a section 1983 action the issues of the motivation and justification for his discharge. On December 3, 1986, Barnes filed a notice of appeal of the district court's dismissal of his section 1983 action.

In the same order issued on November 6, 1986, the district court denied the defendants' motion for summary judgment against Thompson. Although the court determined that the parties were bound by the Board's findings concerning the allegations about Thompson's misconduct,

the court noted that the Board's findings were in Thompson's favor. The Board had determined that Thompson was not guilty of sexual harassment. Therefore, the court concluded that it was possible for Thompson to prevail in his retaliatory discharge claim,[6] so long as he could establish that he was discharged because he had voiced an opinion about a matter of public concern. Accordingly, the district court allowed discovery to proceed with respect to Thompson's federal claim.

On February 4, 1987, the defendants moved for summary judgment against Thompson partly on the ground that the speech Thompson claimed motivated his discharge did not address a matter of public concern but rather, touched "only upon matters of a personal interest as an employee."

On June 2, 1987, the district court granted the defendants' motion for summary judgment after concluding that Thompson's speech had not addressed a matter of public concern. The court stated in its Memorandum Opinion and Order:

> The expression plaintiff claims to have motivated his discharge was to the effect that the agency needed a 24-hour deadline for equipment repairs, that it did not

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[6]The court stated in its Memorandum Opinion and Order:

"The First Amendment issue was not litigated before the Personnel Board and it made no findings either express or implied. Therefore, since we are concerned with collateral estoppel rather than with *res judicata*, the causes of action between the administrative proceeding and this proceeding being different, the issue of unconstitutional motivation is not precluded by the administrative decision. . . . However, both parties are bound by the factual findings of the Board that Thompson was guilty of inefficiency, but not guilty of sexual harassment. . . ."

divide its budget fairly, and that the agency should purchase only the best equipment at a fair price[7] .... It is obvious to this court that this expression is of purely personal and parochial interest within the public agency for which the plaintiff works, if that.

* * * *

In holding that the plaintiff has not met this burden the court can only note that the subject of the plaintiff's speech is less imbued with the public interest than that of the plaintiffs in *Landrum* [*v. Eastern Kentucky Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984)], *McMurphy* [*v. City of Flushing*, 802 F. 2d 191 (6th Cir. 1986)], *Ferrara* [*v. Mills*, 781 F. 2d 1508 (11th Cir. 1986)], or *Connick* [*v. Myers*, 461 U.S. 138 (1983)], and nothing

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[7]In a deposition, Thompson identified three subjects of speech which he claimed led to his discharge, and to whom they were said:

Q. You said certain things to someone. Who did you say them to?

A. (Inaudible)

Q. You need to speak up a little bit, Mr. Thompson, she can't hear you.

A. General conversation with agency's personnel and vendors.

. . . .

Q. So if I remember them correctly, there was the fact that your section didn't get enough of the budget, and that there wasn't a 24 hour [repair] deadline [for equipment] until you posted one, and that you objected to the purchasing practices of the department. Those are the three areas that you thought they should do differently, right?

A. Not of the department; of our individual division.

Q. Right, but I'm saying those are the things you say you complained about that was the reason they fired you, right?

A. Yes, I think these were the main.

like the cooperation with the state attorney general's investigation held to have merited protection in *Marohnic* [*v. Walker*, 800 F. 2d 613 (6th Cir. 1986)]. Just because the expenditure of public funds is tangentially implicated does not automatically entitle the expression to protection.

After the district court rendered its decision, Thompson timely filed a notice of appeal. Because the underlying facts are the same in both Barnes's and Thompson's appeals, their appeals have been consolidated for disposition before this court.

II

In *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220 (1986), the Supreme Court held, "when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Elliott*, 106 S.Ct. at 3227.

In addition, section 1738 of Title 28 of the United States Code requires that federal courts afford state court judgments both the issue and claim preclusive effects in subsequent actions under 42 U.S.C. § 1983 that the state courts would afford them. *See Elliott*, 106 S.Ct. at 3225 (citing *Allen* v. *McCurry*, 449 U.S. 90 (1980) (issue preclusion), and *Migra* v. *Warren City School District Bd. of Educ.*, 465 U.S. 75 (claim preclusion)).

Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action when the causes of action in the two proceedings are not the same. *See Vinson* v. *Campbell County Fiscal Court*, 820 F. 2d 194, 197 (6th Cir. 1987);

George v. *United Kentucky Bank, Inc.*, 753 F. 2d 50, 53 (6th Cir.), *cert. denied*, 471 U.S. 1018, 474 U.S. 821 (1985). Moreover, in general, Kentucky courts apply the doctrine of issue preclusion or collateral estoppel, "only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment."
Sedley v. *City of West Buechel*, 461 S.W. 2d 556, 558 (Ky. 1970).

Barnes' section 1983 action to redress the alleged violation of his right to free speech is not the same cause of action as the state action in which he sought judicial review of an administrative decision. Accordingly, the doctrine of claim preclusion does not prevent Barnes from proceeding with his federal claim.

However, the district court concluded that the doctrine of issue preclusion, as applied by the Kentucky courts, does prevent Barnes from succeeding in his section 1983 claim. The court so held because the state courts sustained the Board's determination that Barnes was discharged for having engaged in sexual harassment. Thus, the district court determined that Barnes could not prevail in a federal action in which he essentially claimed that his discharge was unjustified.

When the Kentucky state courts reviewed Barnes's discharge, the only matter determined was whether the Board's factual finding that the discharge was justified because Barnes had engaged in sexual harassment was supported by substantial evidence in the record. Whether the defendants' motivation for the discharge was unconstitutional simply was not an issue in the state judicial proceedings. Thus, because Barnes's section 1983 action involves a constitutional issue which was not involved in

the state proceedings, the district court erred in concluding that the doctrine of issue preclusion bars further litigation of Barnes's federal claim.

The district court dismissed Barnes's action before this court issued its decision in *Wicker* v. *Bd. of Educ.*, 826 F. 2d 442 (6th Cir. 1987), a case involving issues similar to those presented in Barnes's appeal. In *Wicker,* a Kentucky school superintendent was fired after a hearing before the school board employing him on charges that he inadequately handled the school system's financial affairs. Wicker, the superintendent, then filed suit in federal court under section 1983 claiming, *inter alia,* that the real reason for his discharge was because he had not supported some of the Board members in a recent election. After he filed suit in federal court, Wicker apparently filed the same suit in state court. The federal court decided to enter an absention order and Wicker then filed in state court an *England* reservation of the federal issues.[8]

The state court reviewed the Board's findings and upheld the discharge. Wicker then returned to federal court

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[8]In *England* v. *Louisiana Bd. of Medical Examiners,* 375 U.S. 411 (1964), a federal court plaintiff was forced to go to state court after the federal court abstained to allow a state court to decide the state law issues raised in the federal action. The federal court concluded that the state law issues might be dispositive of the entire litigation and that therefore, abstention was proper in order to avoid an unnecessary conflict between state and federal jurisdiction. The Supreme Court held that the plaintiff was not bound to forego his choice of a federal forum and could, by notifying the parties and state court that he was reserving his federal issues, limit the state court's determination to the state issues, even though the state court might otherwise have had concurrent jurisdiction over the federal issues. However, the Court also held that even if a plaintiff files a reservation, a plaintiff can lose the right to a federal forum if the plaintiff fully presents the federal issues to the state court. *See England,* 375 U.S. at 421.

and that court dismissed his action on the ground that the state decision upholding the discharge precluded consideration of his constitutional claim.

This court reversed the district court's decision concluding,

> [t]he state court finding of legal cause . . . does not resolve Wicker's federal discrimination claim under *Mt. Healthy* [*City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (a plaintiff may prevail in a section 1983 claim of retaliatory discharge if the plaintiff can show that he or she was engaged in a constitutionally protected activity and that the activity was a substantial or motivating factor behind the discharge)].[6]
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> [6]Defendants argue that *Kendall v. Bd. of Educ. of Memphis City*, 627 F. 2d 1 (6th Cir. 1980), precludes Wicker's due process claims. *Kendall* found that the defendant Board could meet its burden concerning the denial of procedural due process by showing that its charges against plaintiff were true and that it would have discharged him regardless of the procedure provided. We agree with Wicker's argument here that the truth of the charge upon which his termination was upheld is not as important as the reason for which he was fired under *Mt. Healthy*. The truth of the charges raised is only important if defendants can show that Wicker would have been discharged therefor despite any protected activity.

Wicker, 826 F. 2d at 449; *see also*, *Wicker*, 826 F. 2d at 451 (noting that Kentucky may not apply its preclusion rules as strictly to questions of law and that different standards of proof may render issue preclusion rules inapplicable). We reached this conclusion in *Wicker*, even though we assumed that Wicker had tried to raise and fully litigate the issue of whether he was discharged in retaliation for his political

views in the state courts, because it was clear from the record in that case that the state courts never reached the constitutional issue. *Wicker*, 826 F. 2d at 449.

In Barnes's case, it is unclear to what extent, if any, he raised his constitutional claim in the state proceedings. However, it is clear from the record that his constitutional claim never was resolved by any of the state tribunals.

Unlike the plaintiff in *Wicker*, Barnes did not make an explicit *England* reservation of his federal claim after the district court decided to hold the federal litigation in abeyance until the state judicial review of his discharge had concluded. However, also unlike the plaintiff in *Wicker*, Barnes filed suit in state court *before* he filed suit in federal court. By splitting on his own initiative the state and federal actions stemming from his discharge, Barnes achieved the very same effect that he would have had he made an *England* reservation. Consequently, we do not view the absence of an *England* reservation as a factor which distinguishes the applicability of *Wicker* to this case. We find the analysis presented in *Wicker* persuasive and, accordingly, dispositive of Barnes's appeal.

The district court's initial conclusion is correct. The factual determination of the state administrative proceedings, as sustained by the state courts, that Barnes was guilty of sexual harassment may not be relitigated in federal court. However, the fact that Barnes harassed females during his tenure at the Bureau does not eliminate the possibility that the real reason he was discharged from the Bureau was because he spoke out on a matter of public concern. Thus, if Barnes can establish that he spoke on a matter of public concern and that his speech was a motivating factor for his dismissal, Barnes may be able to prevail in a retaliatory discharge action under section 1983 even though he was guilty of sexual harassment.

Accordingly, the district court erred in dismissing Barnes's federal action on the ground that the doctrine of issue preclusion, as applied in Kentucky, prevents consideration of his retaliatory discharge claim. We believe that Barnes must be given the opportunity to present evidence supporting his assertion that the real reason for his discharge was because his speech addressed a matter of public concern. Therefore, the district court's decision granting summary judgment in favor of the defendants on Barnes's claim is reversed and that case is remanded for further consideration.

III

The district court allowed Thompson's case to proceed through the discovery stage and subsequently granted summary judgment in favor of the defendants on Thompson's claim after concluding that Thompson had not engaged in speech which addressed a matter of public concern.

In order to prevail in a retaliatory discharge action under section 1983, a plaintiff must first establish that he or she engaged in speech which is constitutionally protected because it addressed a matter of public concern. *Rankin* v. *McPherson*, 107 S.Ct. 2891, 2896-97 (1987); *Connick*, 461 U.S. at 146. Whether a plaintiff's speech addressed a matter of public concern is a question of law, requiring *de novo* review by an appellate court. *See Rankin*, 107 S.Ct. at 2897 & n.9. If the plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. See *Rankin*, 107 S.Ct. at 2896, 2898.[9]

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[9]If a plaintiff establishes that any part of his or her speech addressed a matter of public concern, the state then bears the burden of justifying the discharge on legitimate grounds. *See Rankin*, 107 S. Ct. at 2898; *McMurphy* v. *City of Flushing*, 802

(Footnote Continued on Next Page)

In *Connick,* the Supreme Court provided guidance for determining whether a public employee's speech addressed a matter of public concern. In that case, an assistant district attorney, objecting to her employer's proposal to transfer her, circulated a questionnaire among her fellow workers asking their opinions concerning several office policies, including the transfer policy. Her employer then fired her for refusing to accept the transfer. The former assistant district attorney filed suit, claiming that she was fired because of her speech, i.e., the questionnaire.

(Footnote Continued From Preceding Page)

F. 2d 191, 197 (6th Cir. 1986). To determine whether the state has met is burden, the court is required to balance " 'the interests of the [employee] as a citizen in commenting upon matters of pubilc concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick,* 461 U.S. at 142 (quoting *Pickering* v. *Bd. of Educ.,* 391 U.S. 563, 568 (1972)). Factors which are relevant to this balancing analysis include the manner, time, and place of the employee's expression, and the context in which the dispute arose. Also relevant is whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Rankin,* 107 S. Ct. at 2898-99. The balancing analysis is part of the "ultimate issue [of law] — whether the speech is protected." *See Rankin,* 107 S. Ct. at 2897 n.9., 2898-99.

If, after these first two steps, a court determines that the employee's speech is protected, the employee then must show that the speech was a substantial or motivating factor in the adverse employment decision. Once an employee makes this showing, the defendant must establish by a preponderance of the evidence that it would have taken the same employment action even in the absence of the protected conduct, in order to escape liability. *See Mt. Healthy,* 429 U.S. at 287. These issues are questions of fact. *Daniels* v. *Quinn,* 801 F. 2d 687, 689 (4th Cir. 1986).

The Supreme Court determined that only one question on the form, whether assistant district attorneys "ever [felt] pressured to work in political campaigns on behalf of office supported candidates," *Connick*, 461 U.S. at 149, addressed a matter of public concern. The Court concluded that the rest of the questions were not designed "to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148. Accordingly, the Court concluded that those questions merely reflected "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre." *Ibid.*

In reaching this conclusion the Court emphasized the limited nature of the inquiry into whether a public employee's speech addressed a matter of public concern:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. . . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. 146-47.

In a case with facts relevant here, the District of Columbia Circuit relied on this passage from *Connick* when it rejected the claim of an FBI agent that he had been suspended without pay in retaliation for his speech. *Murray* v. *Gardner*, 741 F. 2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985).

The agent in *Murray* claimed that his criticism of a plan by his superiors to furlough one-third of the agents in his field office addressed a matter of public concern because "public monies and government efficiency [were] involved." The District of Columbia Circuit, implying that those two arguments can be raised in connection with virtually any public employment matter, concluded that if it accepted the agent's claim, "*Connick* would stand for nothing." *Murray*, 741 F. 2d at 438.

We agree with the District of Columbia Circuit's reasoning in *Murray*. The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.

However, it is possible to view allegations that public monies are being spent unwisely and that a government program is being run inefficiently, as implying that a public agency or official is corrupt. This court recently "has held that speech disclosing public corruption is a matter of public interest and therefore deserves constitutional protection." *Solomon* v. *Royal Oak Township*, 842 F. 2d 862, 865 (6th Cir. 1988) (citations omitted).

Yet while a simple allegation that a public employee's speech disclosed corruption in a public agency satisfies the pleading requirements of the Federal Rules of Civil Procedure, those same rules require that when a defendant has moved for summary judgment, a plaintiff must present concrete evidence to support the allegation in order to survive the motion. The evidence need not be conclusive on the

issues presented in the litigation, but it must sufficiently indicate the existence of facts which are disputed by the parties and which are material to the litigation to defeat the defendant's motion. As the Supreme Court repeatedly has emphasized, Federal Rule of Civil Procedure 56(c)

> mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . . The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [his or her] case . . . .

Celotex Corp. v. *Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

The speech alleged by Thompson in the complaint is concerned with the operation of the Bureau, a public agency. It is possible to read the allegations in the complaint as charging corruption in the agency, most notably on the part of McDowell, and as charging discrimination by the agency against totally blind individuals.

The defendants' motion for summary judgment was filed in February, 1987. By the time the district court ruled on the motion nearly four months later, Thompson had been afforded full opportunity to conduct discovery and to supply the district court with concrete evidence supporting the allegations raised in his complaint. Apparently, the only evidence presented to the court by either side was Thompson's deposition. We have reviewed the pages of that deposition designated for our consideration and conclude that the district court did not err in determining that none of the three items Thompson identified as the cause of his dismissal addressed matters of public concern. While Thompson may have been justified in his beliefs that his

section of the Business Enterprises Program did not receive enough of the operating budget, that the Program should have had a 24-hour repair deadline before he instituted one and that the wisdom and propriety of some of the Program's purchasing practices was questionable,[10] he presented no evidence linking any of these charges to corruption in the Bureau or in the Program. Consequently, instead of having addressed a matter of public concern, Thompson's complaints appear to be nothing more than examples "of the quintessential employee beef: management has acted incompetently." *Murray*, 741 F. 2d at 438.

Thus, on the basis of the record before it, the district court did not err in granting summary judgment in favor of the defendants on the ground that Thompson's speech did not address a matter of public concern.[11]

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[10]At one point, during his deposition Thompson stated:

> I wanted to make sure that when things were purchased, we knew that we were paying for what. I felt we needed to know who we were paying and what we were paying for. I didn't feel we should just give blank checks to people because they are suppliers of anything.

At another time he stated:

> I wanted to do things different. I wanted to buy the best machines. I felt like we weren't buying the best.

Whatever implications may be read into these statements, Thompson never presented the court with any evidence indicating even a remote connection between these practices and corruption at the Bureau. Accordingly, his statements standing alone do not sufficiently raise an issue of material fact to survive the defendants' motion for summary judgment.

[11]Barnes's allegation that his speech addressed a matter of public concern were raised in the same complaint as Thompson's. In further proceedings on his claim, those allegations are subject to the same evidentiary requirements applied to Thompson's claim. In other words, on remand, Barnes must present the court with

(Footnote Continued on Next Page)

IV

For the foregoing reasons, the district court's decision awarding summary judgment in favor of defendants in Thompson's case is AFFIRMED No. 87-5776. The decision in Barnes's case is REVERSED and that case is REMANDED for further consideration No. 86-6261.

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evidence supporting his allegations that his speech addressed a matter of public concern.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 83-09

ROBERT BARNES and
JOE THOMPSON - - - - - - *Plaintiffs*

v.

CHARLES MCDOWELL,
ED FOSSETT, and
SAM SERAGLIO - - - - - - *Defendants*

JUDGMENT — Filed November 6, 1986

Pursuant to the Memorandum Opinion and Order entered concurrently herewith,

IT IS ORDERED AND ADJUDGED as follows:

1. That the motion of the plaintiff, Robert Barnes, for reconsideration of this court's order, entered September 19, 1986, granting summary judgment for defendant as to plaintiff Barnes, be, and it is, hereby DENIED; and

2. That the complaint and amendment to the complaint of the plaintiff, Robert Barnes, be, and it is, hereby DISMISSED, with prejudice, at the cost of said plaintiff.

This is a final and appealable order as there is no just reason for delay.

This 6th day of November, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

No. 83-09

ROBERT BARNES, ET AL. - - - - - *Plaintiffs*

v.

CHARLES MCDOWELL, ET AL. - - - *Defendants*

MEMORANDUM OPINION AND ORDER

Filed November 6, 1986

This 42 U.S.C. §1983 action is before this court on appropriate motions to resolve the defendants' pleas of *res judicata*, presented by their motions for summary judgment.

FACTS

This action was commenced by plaintiffs Robert Barnes and Joe Thompson in response to adverse personnel actions taken by the Kentucky Department for the Blind (formerly the Kentucky Bureau for the Blind) against the plaintiffs. The bases for the actions were sexual harassment of female employees and general incompetence or inefficiency. Both plaintiffs were discharged.

Plaintiffs allege that they made critical comments regarding the Department for the Blind and defendant McDowell, Executive Director of the Department for the Blind and plaintiffs' superior, and that this was the real basis for the personnel actions.

Plaintiffs appealed the job actions to the Kentucky State Personnel Board.[1] The Board affirmed the Barnes dismissal but ordered Thompson reinstated following a thirty-day suspension.

Plaintiff Barnes, but not plaintiff Thompson, then filed an appeal in the Franklin Circuit Court in which the Board's decision was affirmed. The Court of Appeals affirmed the Circuit Court. The Kentucky Supreme Court denied review.

Thus, it may be seen that Barnes went the full route of administrative review and lost both before the Personnel Board and before the state courts,[2] which affirmed both the findings of fact and conclusions of law of the Personnel Board. Therefore, the state courts have adjudicated that Barnes was guilty of misconduct and justly dismissed for that reason.

Plaintiff Thompson did not appeal beyond the State Personnel Board, which found that he was not guilty of sexual harassment, but was guilty of inefficiency sufficient to justify a thirty-day suspension. The Board found that Thompson had received one promotion too many, that he was not competent to discharge his duties effectively, but was not guilty of actual misconduct. Thus, the Board modified the penalty as to Thompson to a thirty-day suspension pursuant to Ky. Rev. Stat. 18A.095(23)(c).

Following a hearing held on September 11, 1986, this court granted summary judgment for defendants as to plaintiff Barnes, but did not enter a separate judgment

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[1]This appeal is authorized by Ky. Rev. Stat. 18A.095(9). The Board holds formal hearings, sometimes using a hearing examiner. The factual findings mentioned in this opinion were made by a hearing examiner and affirmed by the Board.

[2]Appeal to the Franklin Circuit Court and full appellate review is provided by Ky. Rev. Stat. 18A.100(2).

under Fed. R. Civ. P. 58 or certify the matter for appeal. The court further ordered that plaintiff Thompson file a supplemental memorandum of law addressing the issues of *res judicata* or collateral estoppel applicable to the above administrative proceedings, with particular attention to the recent decision of the Supreme Court of the United States in *University of Tennessee* v. *Elliott*, — U.S. —, 106 S. Ct. 3220 (1986).

This memorandum has been filed. Barnes has also filed a motion to reconsider this court's granting of the defendants' motion for summary judgment based on *res judicata*.

Barnes' Claim

It is clear under recent decisions of the Supreme Court of the United States that the claim of the plaintiff Barnes is barred by that aspect of the doctrine of *res judicata*, referred to as collateral estoppel.[3] The Personnel Board

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[3]An excellent albeit succinct statement of the principles of *res judicata* and collateral estoppel as applicable to both courts and administrative agencies may be found in C. Koch, *Administrative Law and Practice*, §6.63 (1985), as follows:

> "The concepts of collateral estoppel and *res judicata* are often commingled but the two doctrines have different applications. Both involve the conclusive effect of judgments in subsequent actions. The difference lies in the fact that in *res judicata* the subsequent suit involves the same cause of action, while in collateral estoppel the subsequent suit involves a different cause of action. In *res judicata* the first judgment is conclusive, not only on all matters which were actually litigated, but on all matters which could have been litigated. This is because the effect of the first judgment was to extinguish the cause of action. Where the subsequent suit is on a different cause of action, these principles cannot operate. If any conclusive effect is given to the first judgment it can only be in

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found that he had engaged in sexual harassment and was deserving of dismissal for such misconduct. This was appealed to the Kentucky courts and affirmed up the line. Although the cause of action is not the same in this 42 U.S.C. §1983 action, which seeks damages for alleged constitutional violations, as in the proceedings before the Personnel Board, the issue of the reasons for Barnes dismissal and their justification were actually litigated. We are mandated by the Supreme Court to apply Kentucky law to the defendant's defense of collateral estoppel. *Allen* v. *McCurry,* 449 U.S. 90, 101 S. Ct. 411 (1980); *Cf. Migra* v. *Warren City School District Board of Education,* 465 U.S. 75, 104 S. Ct. 892 (1984).

Kentucky law requires that where, as here, the parties to a court action are the same as in previous litigation,[4] issues actually litigated between them shall be considered determined in later litigation, although the causes of action are different. *Whittenberg* v. *Liberty Mutual Ins. Co.,* 390 S. W. 2d 877 (Ky. 1965); *Gilbert* v. *Bowling Green Bank & Trust Co.,* 460 S. W. 2d 14 (Ky. 1970); *Norrell* v. *Electric Water Plant Bd.,* 557 S.W. 2d 900 (Ky. App. 1977).

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regard to issues that were actually litigated and which are pertinent to the cause of action in the subsequent suit.

"The policy underlying the doctrine of *res judicata* is one of repose. The judgment in an action must resolve the doubt between the parties as to the validity of the cause of action. Therefore, theory of *res judicata* is: 'If the judgment is for the defendant and is on the merits, the cause of action is extinguished; that is, the judgment operates as a bar. If the judgment is for the plaintiff, the cause of action is extinguished but something new is added, namely, rights based on the judgment; there is *merger* of the cause of action in the judgment.'" (Footnotes omitted)

[4]Or privity exists between the parties and the present parties.

Therefore, plaintiff Barnes' claims must be dismissed because he is barred by the doctrine of collateral estoppel from relitigating the administrative finding that he was justly dismissed for good cause arising out of his sexually harassing a female employee.

Thompson's Claim

With regard to Thompson's claim, the doctrine of collateral estoppel is equally applicable although neither Thompson nor the Commonwealth appealed the decision of the Personnel Board, finding that Thompson was guilty of inefficiency, but not of sexual harassment. No finding was made by the Personnel Board as to the motive of the defendants in bringing an unfounded sexual harassment charge against Thompson.

The disposition of this issue is controlled by a recent decision of the Supreme Court of the United States, namely, *University of Tennessee* v. *Elliott*, ___ U.S. ___, 106 S. Ct. 3220 (1986). There, the Court held that in §1983 actions the same *res judicata* and collateral estoppel doctrines were applicable to the unappealable decisions of state administrative agencies, acting in a judicial capacity and employing fair procedures, as would be applied by the forum state's courts under state law. *Id.* at 3227. No contention is made that the Kentucky Personnel Board did not act in a judicial capacity in this appeal, or that it does not meet the requirement of employing fair procedures.

It is not totally clear from the opinion in *Elliott, supra,* whether the *res judicata* or collateral estoppel effect would be applicable to conclusions of law[5] of state administrative

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[5]Some authorities say that conclusions of law of administrative agencies are not entitled to preclusive effect in subsequent litigation. K. Davis, *Administrative Law Text,* 363 (3d ed. 1972); C.

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agencies, but it is clear that findings of evidentiary or ultimate fact would have preclusive effect, if they had such effect under the law of the forum state.

Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity were entitled to the same *res judicata* effect as judgments of a court. The earliest case in which such rule seems to have been adopted by the highest court of Kentucky seems to have been *Happy Coal Co.* v. *Hartberger*, 251 Ky. 778, 65 S.W. 2d 977 (1934), involving a collateral attack on an order of the Kentucky Workmen's Compensation Board. There, the court said:

> "It necessarily follows, therefore, that the hearing on the first motion herein, and which was finally disposed of in the first case supra [Happy Coal Company v. Hartbarger, 233 Ky. 273, 25 S.W. (2d) 384], became and was a final adjudication of the rights of the parties as based upon the facts and grounds as they then existed, and which is true because of the well-known doctrine of res judicata, *since it is as applicable to the quasi judicial acts of public commissions and administrative boards, as it is to judgments of courts;* in substantiation of which is the text in 34 C.J. 878, §1287, saying: 'The rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and quasi judicial

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Koch, *Administrative Law & Practice*, 513 (1985); *United States* v. *Karlen*, 645 F. 2d 635, 638 (8th Cir. 1981); *Mosher Steel Co.* v. *N.L.R.B.*, 568 F. 2d 436 (5th Cir. 1978); *Weed* v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713 (N.D. Texas 1983). This preclusive effect of an administrative agency's conclusions of law, if any, need not be considered by the court in this action.

acts of public, executive, or administrative officers and boards acting within their jurisdiction as to the judgments of courts having general judicial powers. This rule has been recognized as applying to the decisions of road or highway commissioners, boards or audit, county boards, common council or municipal assembly, tax commissioners, boards, or officers, school commissioners, police commissioners, public service commissioners, land commissioners or officers, patent officers, collector of customs, referees in bankruptcy, and other like officers and boards.'

"Cases from many state courts, as well as federal ones, are cited in the copious notes to that text. There is also a reference in note 3 to that text to a prior section in the same volume (1171) on page 759, in which the complier thereof says: 'A decision rendered by an officer or board of state or municipal officers, when acting judicially, and which has by law the force and effect of a judgment, is a bar to further actions on the same matter between the parties or their privies,' etc. That text is also fortified by many cases cited in note 93. See, also, 15 R.C.L. 998, §474. We deem it unnecessary to incumber this opinion with further substantiating authority, since the rule as incorporated in the inserted texts rests upon a sound basis. *If it were otherwise, a movant desiring compensation before the board having charge of the administration of such acts would never be concluded, and could perpetually harass his adversary from day to day, as well as the board, with successive motions based upon the same facts, until the time expired under the law for making them. Such a procedure is in direct conflict with the cherished rule that 'there should be a finality to litigation,' and to that end the law disallows to the losing litigant, or claimant, a second in-*

dependent cause of action or complaint based upon the same facts and upon the same grounds of his former lost one." (Emphasis added).

65 S.W. 2d at 978.

Many subsequent decisions of the Kentucky courts have applied the same rules of issue and claim preclusion.[6] *Bank of Shelbyville* v. *People's Bank of Bagdad*, 551 S.W. 2d 234 (Ky. 1977) (change of conditions renders usual rule inapplicable); *Dink* v. *Palmer-Ball*, 479 S.W. 2d 897 (Ky. 1972) (same); *Webb Transfer Line* v. *Jones*, 379 S.W. 2d 444 (Ky. 1964) (collateral estoppel for all dates prior to previous decision) (extensive discussion of previous authorities); *Bauer* v. *Alcoholic Beverage Control Board*, 320

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[6]The use of the terms "issue" and "claim preclusion" has been explained as follows:

> "The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata.' See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts; 'issue preclusion' and 'claim preclusion.' Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24."

Migra v. *Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, 894, n.1 (1984).

S.W. 2d 126 (Ky. 1959); *Hysteam Coal Corporation* v. *Ingram*, 283 Ky. 411, 141 S.W. 2d 570 (Ky. 1940); *Cardinal Bus Lines* v. *Consolidated Coach Corp.*, 254 Ky. 586, 72 S.W. 2d 7 (Ky. 1934).

It may be seen, then, that the Kentucky courts give broad claim and issue preclusive effect to the unreviewed decisions of administrative agencies, possibly going even to issues of law.[7] Certainly many of the decisions listed above involved issues of ultimate fact.

It appears to this court that the Kentucky courts subscribe closely to the philosophy of the Restatement (Second) of Judgments §83, Comment b, where it is said:

> "Where an adminstrative forum has the essential procedural characteristics of a court, therefore, its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court."

Therefore, there is no doubt that the unreviewed findings of fact of the Personnel Board in its determination of Thompson's appeal have issue preclusive or collateral estoppel effect. The defendant's problem is that Thompson largely prevailed before the administrative forum. It found that the proof of the charges brought against Thompson by the defendants did not rise to the level of sexual harassment, although he was guilty of inefficiency. If, as Thompson alleges, the unfounded charges were motivated by defendant's desire to retaliate against him for exercise of his First Amendment rights on issues of public concern, he has a cause of action under §1938. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977);

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[7]See note 5, *supra*.

Connick v. *Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983); *Landrum* v. *Eastern Kentucky University*, 578 F. Supp. 241 (E.D. Ky. 1984), and cases therein cited.

The First Amendment issue was not litigated before the Personnel Board and it made no findings thereon either express or implied. Therefore, since we are concerned with collateral estoppel rather than with *res judicata*, the causes of action between the administrative proceeding and this proceeding being different, the issue of unconstitutional motivation is not precluded by the administrative decision. *Whittenberg* v. *Liberty Mutual Ins. Co., supra.* However, both parties are bound by the factual findings of the Board that Thompson was guilty of inefficiency, but not guilty of sexual harassment. *Deretich* v. *Office of Administrative Hearings*, 798 F. 2d 1147 (8th Cir. 1986). *Cf. Richardson* v. *Phillips Petroleum Co.*, 799 F. 2d 426 (8th Cir. 1986) (issue not litigated in administrative proceeding); *See Polk* v. *Yellow Freight System, Inc.*, 801 F. 2d 190 (6th Cir. 1986) (decision by an agency on unemployment compensation preclusive as to issues properly before agency, but not others, due to narrow scope of proceedings).

Therefore, the motion for summary judgment against Thompson on the basis of collateral estoppel must be DENIED. An appropriate order is this day entered.

This 6th day of November, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge

Commonwealth of Kentucky

STATE PERSONNEL BOARD

ROBERT BARNES - - - - - - - *Appellant*

v.

BUREAU FOR THE BLIND - - - - - *Appellee*

FINAL ORDER

* * * *

The full Board at its regular January 1983 monthly Board meeting, having considered the amended Findings of Fact, Conclusions of Law and Recommended Order of the hearing officer herein, Honorable Wilfrid Schroder, and having considered the testimony, pleadings, and arguments of counsel previously made in this case, and being duly advised,

IT IS ORDERED by the Board that the amended Findings of Fact, being twenty eight (28) in number, Conclusions of Law and Recommended Order dated December 8, 1982, of said hearing officer are sustained.

IT IS FURTHER ORDERED that the dismissal of the appellant herein, Robert Barnes, from his merit system position by the appellee, Bureau for the Blind, is sustained and therefore, the appeal of the appellant is denied.

IT IS FURTHER ORDERED that all pending motions and exceptions are overruled.

IT IS FURTHER ORDERED that the Secretary to the Personnel Board shall execute and transmit this order.

This 24th day of January, 1983

(s) Arthur Hatterick, Jr.
Arthur Hatterick, Jr. Secretary
State Personnel Board

Copies sent to all parties and
attorneys of record.

Commonwealth of Kentucky

PERSONNEL BOARD

Appeal Nos. 82-95 & 82-96

ROBERT BARNES and
JOE THOMPSON - - - - - - - *Appellants*

v.

BUREAU FOR THE BLIND - - - - - *Appellee*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

* * * *

A joint hearing was held on the above styled appeals in Frankfort, Kentucky, on July 12, 13 and 16, 1982, pursuant to notice to all parties. The appellant, Robert Barnes, was present and represented by the Hon. Philip Kimball. Appellant, Joe Thompson, was present, and represented by Hon. James Groves. The appellee, Bureau for the Blind, was represented by the Hon. Edward Fossett. The Court reporters were Juanita Toole, Terri Hockensmith, and Sandy Harding. The hearing officer was Wilfrid Schroder.

Pursuant to prior authorization of the hearing officer, the deposition of a witness Jeanne H. Pherson, was taken on July 2, 1982, before the Court Reporter, Terry Hockensmith, and the testimony considered as if taken at the hearing itself. By interlocutory order entered July 16, the hearing officer authorized the filing of only the original of Exhibit E, with the Exhibit forwarded with the recommended order. Also, Exhibit F was sealed by the hearing officer to keep confidential client's names and that exhibit also forwarded to the Board.

FINDINGS OF FACT

1. The appellant, Robert Barnes, was employed by the Bureau for the Blind as Director of the Division of Business Enterprises Program. By letter dated April 30, 1982, this appellant was demoted from his non-merit position to his former merit position as Education Program Supervisor II and dismissed, effective immediately. On March 18, 1982, this appellant had been suspended without pay pending an investigation of a charge of sexual harassment by the appellant and of allowing or condoning a subordinate to take part in sexual harassment. The April 30 letter also included charges of improper, unprofessional, and unsatisfactory work performance.

2. The appellant, Joe Thompson, was employed by the Bureau for the Blind as Training Officer and Instructor, and maintenance supervisor. By letter dated April 30, 1982, this appellant was dismissed from his position effective immediately. On March 18, 1982, this appellant had been suspended without pay pending investigation of sexual harassment charges. The April 30 dismissal incorporated the sexual harassment charges and included unsatisfactory work performance.

3. The deposition of Jeanne H. Pherson was taken on July 2, 1982, at the Kentucky Vocational Services Building in Louisville, Kentucky. Ms. Pherson is employed with the Department for the Blind as an Administrative Branch Manager, with offices at 1900 Brownsboro Road, in Louisville, Kentucky. Ms. Pherson testified that in October of 1981, while standing in the reception area at the office in Frankfort, Kentucky, Bob Barnes started a conversation. He appeared to have been drinking and then took Ms. Pherson's arm to walk back to his office. Ms. Pherson worked in a different division and office than Mr. Barnes

but was acquainted with him. In walking back to his office, he began discussing the pending layoffs and insinuated that Ms. Pherson was going to be laid off. He offered her a job with his unit and then backed her against the wall which made her very uncomfortable. He then took both of his hands and started rubbing them up and down her hips. Ms. Pherson turned her head away because of his breath (he admits to one drink). He took his hand and touched her above the breast, started pushing down when she knocked his elbow away and got away. The incident had been reported to Sam Serraglio, Personnel and Finance Officer, as well as to Mr. Charles McDowell, the Executive Director for the Bureau. Ms. Pherson requested that charges not be pressed and Mr. Barnes later apologized for the incident. After the incident, Ms. Pherson was very uncomfortable around Bob Barnes and avoided him on every occasion. Mr. Barnes claims that he only put his hands on her shoulders, nothing more, and noted that Jeanne Pherson did not file a complaint. The hearing officer finds Bob Barnes made unwelcome physical advances on Jeanne Pherson, while purportedly using her reaction as a basis for a proposed employment decision affecting her. The conduct of this appellant at work was offensive to the victim who did nothing to encourage this type of conduct. If Mr. Barnes is correct in that he only had one drink, he has no mitigating circumstances to consider.

4. Elizabeth (Libby) Ann Williams testified as a victim of sexual harassment. She is employed by the Bureau for the Blind and was stationed at 1900 Brownsboro Road when she felt victimized. The appellants and Libby worked together in the same department. Everything she seemed to say around either appellant would be twisted so as to have a sexual connotation. The chief culprit for Libby appeared to be appellant Joe Thompson. On one occasion

in the latter part of January, 1982, Joe Thompson offered to help Libby remove dog hair from her skirt. He was not very successful in brushing the hair off so he wet a paper towel and started removing the hair. When he got down to her genital area, he stopped, according to Libby, and held the towel for a few seconds. About a week later, Libby mentioned the incident to Bob Bird, a Supervisor in the Breckinridge Lane Office, who advised her to contact Sam Serraglio. She said nothing to Joe at the time. Joe Thompson's version of what happened when he tried to remove the dog hair was that, as in the past when he had been asked by Libby to remove things such as dog hair or lint from her clothing, there was nothing different, nor did he hesitate when he had his hand on her dress.

The hearing officer finds Libby was apprehensive but does not find appellant Thompson took any liberties or hesitated when brushing the dog hair.

5. On another occasion somewhere around the first week of February, 1982, Libby Williams was sitting at her desk eating purple yogurt. Libby had the impression that they were comparing the yogurt to secretions which occur during sexual intercourse. Joe Thompson stated that Libby had spilled some and had it on her fingers and was licking it off. Bob Barnes remembered commenting "Yech". When Libby asked what was wrong, Joe said it looked like clabber. Bob Barnes asked Libby to eat lunch with them rather than eat the yogurt. Libby declined and the incident ended. Clabber is a sour, curdled milk, a term Libby was not familar with and was mistakenly thought to have reference to bodily secretions.

6. The relaxed atmosphere that Libby Williams, Joe Thompson, and Bob Barnes worked in contributed to what was said and the meaning thereof. Back at the Breckinridge Lane office, and carried with the move to Browns-

boro Road Office, there was a constant telling of jokes. I'm including various comments to set the stage.

Frank Otis Reeder testified as a refrigeration man for Kentucky Business Enterprise Program, under Joe Thompson. Frank had been in the office before on Breckinridge Lane and knew Libby Williams. He heard a number of the jokes that were told in Breckinridge and he felt the jokes that he heard were not real harsh jokes. When a dirty word or two was used Libby would usually laugh the same as the others present and did not appear to resent any joke that was told.

Esther Ungles works for the Bureau for the Blind at the Breckinridge Lane office. Esther testified that when Joe Thompson was in the Breckinridge office, he had a habit of twisting everything that was said so that it had a filthy or a sexy meaning. On one particular occasion, she remembers that after Libby Williams left the room, Joe said that he would like to screw a virgin, and made it appear that he was talking about Libby. Esther nicknamed Joe "garbage mouth" due to his continuous inuendos and outright statements.

Betty Gissoni works for the Bureau for the Blind, Center for Independent Living in Louisville. Up until 1975, she had been a training officer and got to know Joe Thompson. She also became acquainted with Libby Williams. For a year or two she would see her on a daily basis. She has heard Libby tell extremely dirty jokes and she has told Libby dirty jokes. Neither party was upset by the nature or character of the jokes and since Libby has moved, she occasionally calls up Betty to tell her dirty jokes over the phone. These dirty jokes were told in mixed company. Joke telling was very prevalent around the break area and the offices. It was Betty's opinion that Libby would only tell these jokes to individuals that would not be shocked

by the joke. Both Mr. Boswell and Mr. Bird have told jokes.

Robert Barnes stated that the atmosphere was laid back or casual and that there was always joking, and it was not that way just with Robert Barnes but with everyone that preceeded Mr. Barnes. Many of the jokes would be dirty jokes but they were told by everyone. Sexual matters were discussed on occasion but Robert stated he didn't know how regular because he was not always there. Robert Barnes testified that at one time he discussed the Alven Barkley sexual harassment case with Libby, and according to Robert Barnes, Libby stated that sexual harassment charges were silly.

Carla Sue Franklin, a part time vendor, was trained by Joe Thompson and knew Libby Williams. Carla heard many jokes but not many off colored ones were told around her. Carla felt Libby flirted with Joe and the hearing officer feels the incidents described contained some flirtation.

Robbie Payne, a former vendor trainee, told Libby many dirty jokes and says Libby reciprocated.

Libby Williams admitted that on occasion she told dirty jokes in the office when either or both Bob or Joe were around. She also admitted that on occasion, she has talked about sex with Joe Thompson but on an adult level. However, Libby felt that Joe got out of hand with his conversations, and she had to terminate them. Libby opinioned that there was much conversation between employees that had sexual overtones or consisted of dirty jokes. With this atmosphere, we can consider the verbal conduct and its relation to sexual harassment.

7. February 10 or 11 of 1982, Libby Williams, Joe Thompson, and Vendor Trainee Robbie Payne, were engaged in a conversation concerning dieting. Libby stated

that when dieting, she always lost weight in a place where she did not want to lose weight. Robbie asked where. Libby replied in her breasts. Joe then said that massaging and exercising boobs (sic) would prevent that. Joe apparently left the area and came back to his desk unknown to Libby and Robbie who continued the conversation. Robbie asked if Libby could get someone to massage her breasts. Robin continued by saying something like massaging may help but if she found a guy that was willing to suck on her breasts it would be a lot more fun, and at that Joe started laughing. At that time Libby and Robbie realized that Joe was in the room. To get past this remark, Libby called back and asked if Joe ever heard of using cocoa butter to enlarge breasts.

8. On February 16, when Joe and Libby were alone in the office, he offered to massage her breast, to prevent the weight loss. Libby states that Joe persisted and stood in front of her desk and appeared to be leaning over toward her, getting closer by the sound of his voice so that Libby feared he was going to reach for her breast. In order to avoid what she feard was contact, she laid down on the top of her desk to keep Joe away. Joe did not touch her. Joe said he wasn't reaching for her and did not lean over Libby. Although Libby feared Joe was about to touch her, the finding is that Joe was not about to touch Libby on that occasion.

9. Later, when Robbie, the trainee, was present, Joe Thompson informed Libby that he had something to massage her breasts. With another person present, Libby did not feel that Joe would actually attempt to massage her breasts. In an attempt to get Joe to cease this conversation, Libby went back to his desk and held out her hand. Joe squirted lotion into it, and insisted that Libby come behind his desk to which she refused. At that point,

Libby felt that if she did go behind his desk he would have massaged her breasts. Libby returned to her desk.

10. - On February 22, 1982, while discussing exercising with Joe, Libby stated that she must have pulled a muscle. Joe offered to massage it, which offer was declined by Libby. On February 23, 1982, after Libby returned from the doctor's office, Joe asked if the doctor took care of her problems, to which she answered yes, and also that the doctor said she should eat more ruffage. Joe said he could have told her that and could have saved her money.

11. On February 26, 1982, Libby Williams offered someone a piece of Doublemint gum. Joe answered that if she left off the Doublemint gum, he would take a piece. After Libby heard the joke she would occasionally holler out to whomever was handy, "Do you want a piece," with a pause, and then add something like, "of cake?".

12. The charge against Robert Barnes concerning the incident in paragraph no. 11 was that as supervisor he took nor corrective action. Robert Barnes stated that he never heard the comment, although he has heard that joke being passed around the office. I think this one passed right by Robert Barnes.

13. On the morning of March 16, as Libby Williams walked into the office, Bob Barnes asked Libby if she was wearing SSY cologne. Libby asked what that was, to which he replied, "That's the P-U out of pussy." Bob Barnes said Libby asked him what the PU out of pussy meant but I find that hard to believe. Libby may have asked Joe but not Bob Barnes.

14. On March 16 or 17, 1982, Libby was standing in front of Joe Thompson's desk when Joe asked what the "A" stood for in Bob A. Barnes' name. Both Bob Barnes and Libby responded, "Allen" at which point Bob asked Joe what the "M" in Thompson stood for, to which Joe stated,

"It stands for mother fucker". Both Bob and Joe, started laughing. Barnes and Thompson deny this incident but Libby Williams' written records are more reliable. Robert Barnes took no disciplinary action or verbal reprimand.

15. In early March or late February of 1982, Libby Williams complained that it was warm in the office, Robert Barnes offered to take her clothes off at any time. Robert Barnes insists this is a complete fabrication. With the loose talk, the records Libby kept, and the attitude of Robert Barnes, the hearing officer finds Robert Barnes did make such a comment.

16. On another occasion while discussing diet, Joe stated to Libby that if she ate what Joe ate at night, Libby would be a lesbian.

17. On one occasion Libby Williams mentioned to Joe that she wanted a candy bar from some old stock. Joe responded something to the effect that she should ask Frank (described only as a black male co-worker) for something long and hard. She may get a candy bar or she may get something else.

18. Libby admitted that at no time did she come right out and say, will you knock it off, or not use that type of conversation or language around her. She stated that she was afraid of losing her job if she told them where she stood or that they would make her job situation intolerable. Joe correctly described Libby as being naive, to an extent. Libby asked Joe many questions on sex as well as other things because she did not understand. He compared her questions to a child's inquisitiveness. Joe appears to have conversed with Libby Williams on many different topics, i.e. intercourse, dating, the toxic shock syndrome, deep throat, and a number of other items. If she got too personal, Joe would tell her so and the conversation would end there.

19. Anna Faye Katon, a blind vendor, has had a number of encounters with Bob Barnes. The first was in the summer of 1978, at the Holiday Inn in Owensboro, Kentucky. Robert Barnes had gone down to talk to Faye about taking a different location. Robert Barnes talked Faye into discussing the matter over dinner with Carol Wesley (now Morris), a counselor in Owensboro, and Fred Fox, Bob Barnes' assistant. After leaving for dinner, the group stopped by Barnes' room. Here Bob Barnes decided not to go out for diner but to send Fred Fox and Carol, leaving Faye with Bob in the motel room. Faye protested and said she did not want to stay alone with Bob Barnes. She told both Mr. Fox and Carol (Carol collaborated this testimony). Fred Fox appeared nervous and talked to Mr. Barnes in the bathroom. After a few minutes, Fred came out and just shook his head. He told Faye he had to go anyway and left with Carol. After everyone was gone except for Bob Barnes and Anna Faye, he told her that he was going to take care of her and that he loved her. At one time Bob Barnes grabbed Anna Faye and pulled her down on the bed. She struggled, pulled away from him. But he kept trying to feel around for her. He kept feeling around and calling her name while she eluded him. She ended up hiding under a desk and was sitting there. Bob Barnes felt the top of the desk for her and kept moving on. He did not pull the chair out from under the desk to find her. When Fred and Carol came back in, Anna Faye was still under the desk. Fred and Carol just laughed it off.

20. Anna Faye Katon has known Mr. Barnes for a number of years and prior to her marriage in July of 1978. The Wednesday prior to her marriage Bob Barnes called her to advise her not to get married. Bob Barnes said that Ray, her future husband, wasn't the man for her, that she didn't know what she was doing. She disregarded his

advice and married Ray. She and her husband attended a conference of blind vendors in Owensboro after her marriage. This meeting of vendors was with Bob Barnes and Joe Thompson with the purpose of discussing mechanic problems. The discussion got out of hand and the meeting was adjourned. A group of vendors decided to go out for a drink. Bob Barnes and Joe Thompson went also. Bob Barnes asked her to dance which she did. After dancing for awhile, Ray, her husband, came up to the dance floor and asked Mr. Barnes to cut in or stop dancing with Faye, which he refused. Barnes says he didn't want to be left on the dance floor. Ray hit Mr. Barnes and a general scuffle ensued. Outside in a parking lot, Ray and Mr. Thompson got into a shoving match, Ronnie Autry, a blind vendor and sister to Faye, was present in the lounge and was under the impresesion that Ray Katon started the scuffle.

21. On another occasion, when Faye Katon was working for OVC Business College, Bob Barnes came down to talk to her one afternoon. Faye asked her brother to stay with her until Bob Barnes came. Her brother and counsin did stay until 10:00 or 11:00. Bob did not show so they left, and Faye went to bed. Later in the evening, there was a knock at the door that she answered and found Bob Barnes standing there. He was drunk, said Fred had let him out of a car. Mr. Barnes said that Fred Fox had let him out to spend the night with Faye. Faye protested so Bob Barnes called Jim McCallum from Anna Faye's room. Jim McCallum was a mechanic and his wife was upset that he was called that late in the evening. Jim did not pick up Robert Barnes. Robert Barnes spent the rest of the night with Faye. At that time, Faye was apprehensive and thought that Robert Barnes made all of the decisions and that her job would depend on whatever Robert Barnes wanted. He would call her at work, causing problems be-

tween her husband and herself. She had requested that Bob Barnes quit calling her at home, which request was ignored by Mr. Barnes.

Faye testified that she made no complaints because of the power she thought Robert Barnes had over her situation and because of the embarrasing character of the complaints. She also preferred not to pursue a complaint except for the fact that Robert Barnes became more persistent in the last few years. Faye is separated from her husband at this time, but it is due to a job separation whereby Bob Barnes has one spouse working at one vending stand in one area of the state and the other in a distant section of the state. Ray lives in Covington and Faye lives in Beaver Dam, which is approximately 200 some miles apart. She had filed for a divorce from her husband at one time but has since reconciled.

Bob Barnes' version of this incident was a denial. He said both that Faye spent the evening with Freddie Fox at the Holiday Inn while Bob Barnes was there and denied that he ever spent a night with Faye at Gabe's Inn in Owensboro. Bob Barnes testified that he never went to Faye's motel room alone but that he had gone to the lobby and called her from the lobby. He further testified that Faye came down and met him in the lobby and they both had something to eat. He told her he couldn't stay but would get a cab and go to another motel to get a room, but that Faye said it was foolish, that she had a room next door to her which she used to store products, which the motel staff was allowing her to use for storage. Bob admits to spending the night in the adjoining room.

Bob Barnes felt that Faye was out to get him for allegedly breaking up a gambling ring that she had in the western part of Kentucky. Also, it was alleged that Faye was purchasing approximately 250-300 cases of canned soft-drinks per week, buying them for $5.00 per case and selling

them for $9.60 per case, realizing a $4.60 per case profit per week. The problem with this was that it was enough to equal the amount of net profit that she was reporting to the program. When Bob Barnes and Charles McDowell decided to audit her, she obtained a lawyer and Charles McDowell backed down. These three incidents Robert Barnes relied upon as proof of an attempt by Faye to get rid of him. The credibility of Bob Barnes' weakens as the hearing officer compared the two versions.

The icing that topped the cake, however, was the demeanor of Bob Barnes at the personnel hearing. Upon hearing many of the accusations against him, Bob Barnes would laugh. Only when this hearing officer reminded the appellant that this was a serious matter did he stop laughing.

22. In addition to the sexual harassment charges, both Robert Barnes and Joe Thompson were accused of performing their jobs in an unsatisfactory manner, and with less than good behavior. The testimony indicated two areas of concern. One area involved drinking when in the field. It appears that occasionally Bob Barnes and Joe Thompson would schedule a visit to the TVA stand. They always planned leaving Louisville so as to stop in Owensboro for the night and visit the vendors there. Arrival was usually late in the day and frequently vendors paid visits to the appellants at their hotel room for a combination of socializng and business. It was to the appellant's advantage to conduct business so that they could get an early start the next day. Although there was no set schedule, the vendors were told when the appellants would be in town and it was common practice for vendors to show up at the motel without a reuqest to be there. The appellants' conduct frequently left a lot to be desired. James McKeown, a vending machine technician for the Appellee, testified that in February or March of 1981, he had an

appointment to meet Bob Barnes and Joe Thompson at about 7:30 or 8:00 in the evening to fill out some PDQ forms. When he arrived with his son, Jerry, they were unable to raise anyone at the room. Arlin Harrod, an employee of the Bureau for the Blind, had had a room down the hall. James used the phone and finally Bob Barnes answered. When they did go into the room, Joe was passed out on the bed and Bob Barnes appeared to be highly intoxicated. Bob tried to wake Joe and went so far as the beat him on the back. Later on that evening, Bob Barnes and Joe Thompson asked Mr. Harrod to go out to supper, at which time he observed Joe drink a half bottle of either gin or vodka. Since Jim didn't get to fill out the PDQ form that evening, Bob and Joe stopped by his house the next morning at about 9:00.

23. Gracie Stokes, a vendor, testified that on one occasion, she and her husband, also a blind vendor, was supposed to meet Bob Barnes and Joe Thompson concerning getting her husband another stand. Bob and Joe failed to attend the meeting as scheduled. When Gracie called Bob to ask what happened, Bob explained tht Joe was too drunk to attend so the meeting was scheduled for a future date. On that occasion, both parties had been drinking and Joe again was passed out on the bed in the motel room. Gracie and her husband did go to the hotel room and tried to wake Joe but were unsuccessful. They talked to Bob Barnes for a while and he was drinking at the time. This second meeting occurred at about 8:00 p.m.

24. The administrative complaints against Joe Thompson involved both his role as vending machine supervisor and his role as training officer for the vendors who operate the blind stands. In his capacity as vending machine repair supervisor, Joe appears to have done his best. The vendors complained that he wasn't doing a proper job but with backorders, lack of repairmen, and his other duties,

Joe was not able to keep pace with the work but his performance was comparable, and even better than past supervisors of machine repair. To cope with the problem, Joe would himself go out in the field to fix machines, and even after hours. Joe's background as a repairmen was a valuable asset for this part of his position.

25. What Joe Thompson had going for him in his capacity as supervisor of vending machine repairs, he lacked in his role as training officer. Joe had good intentions but apparently little training or supervision for performing as a training officer. His ablity to repair machines did not transfer into teaching others how to run a vending stand. Joe did poorly at scheduling the training sessions and was unable to keep up with the paper work, especially the training reports. Although he attempted to keep things going with his deficiencies, he just could not handle the job of training officer. This conclusion was reached even after charge F, page three of the letter of dismissal was considered an attempt at overkill by including individual trainees that Joe was not responsible for.

Robert Barnes testified that he appointed Joe Thompson to the position of training officer after having offered it to a number of other individuals who declined. Joe had already been appointed supervisor of the repair section and agreed to take on this additional duty.

26. James Whitehouse operates a blind stand located at General Hospital in Louisville, Kentucky. In the Fall of 1981, he made an application for transfer to another location known as the Container Corporation. He was advised by Bob Barnes to put in an application for that position even though he reported to Bob Barnes that he had been delinquent in his set-aside reports, which was supposed to be an automatic disqualification, although Bob Barnes felt that was unfair. On another occasion, Bob Barnes came to Mr. Whitehouse's house and advised him

that there was a vacancy for an assistant manager position at the Capitol Plaza Tower. He informed Bob Barnes that he was delinquent in his set-aside reports but was again told to submit the application anyway. See Exhibit No. 10.

Charles McDowell is employed for the Bureau for the Blind as the Executive Director thereof. Bob Barnes is the director of the division of the BEP under Charles McDowell with Joe Thompson, as training officer under Bob Barnes. Charles McDowell remembers asking Robert Barnes if James Whitehead was qualified for both the Capitol Plaza Tower vending stand and the Container Corporation stand, to which Robert Barnes answered "yes" in both cases. Although Robert Barnes was aware that Mr. Whitehead had not been current in his set-aside reports, and was aware that a delinquency would disqualify him for the transfer, Robert Barnes stated to Charles McDowell that Mr. Whitehouse was qualified for the transfer. As a result of being misled, Charles McDowell did offer the position at the Container Corporation to Mr. Whitehouse. As to the position at the Capitol Plaza Tower, Charles McDowell requested Mr. Barnes double check the application because this could be a potentially sensitive appointment. Again Mr. Barnes assured Mr. McDowell that Mr. Whitehouse checked out alright, but later on that day was informed that Mr. Whitehouse was delinquent. A Mr. Fox informed Mr. McDowell of the same as she was handling the set-aside reports.

27. Ken Boswell is employed with the Bureau for the Blind at 1900 Brownsboro Road and up until March of 1982, had been division director. Bob Barnes was his immediate supervisor. Mr. Boswell related an incident that occurred on election day in November of 1979. For purposes of these findings, the incident can be considered in Bob Barnes' case but not Joe Thompson's, in that the dis-

missal letter made no mention of the incident in Joe Thompson's letter of dismissal. Joe Thompson appeared to have had a bit to drink and was not up to par. There was a meeting going on concerning some coin mechs and Joe would leave the area and come back even more enebriated. Joe Thompson ordered a couple of coin mechs when Ken Boswell informed Joe that he did not have that authority. A discussion ensued which resulted in Mr. Boswell being removed and Joe being placed in charge of Mr. Boswell. This hearing officer will not decide which individual should have been supervisor, as that is a management function, but doing nothing about the drinking was poor performance by Bob Barnes. Part of Bob's problem is the mistaken belief that an employee could not be disciplined for a drinking problem, and that an employer could never note that an employee had a drinking problem. He gave no basis for his opinion but stated it very confidently as if he had been told that by a superior.

28. In September of 1981, Bob Barnes and Joe Thompson were supposed to meet a Barbara Miller, a Supervisor, to discuss a trainee, at 1:00. Charles McDowell had instructed them to deliver a letter of dismissal to a repairman and they waited until shortly after 1:00 before leaving. Barbara testified she was on time but the hearing officer finds that Barbara Miller was not present at 1:00 p.m. (Eastern Time Zone).

CONCLUSIONS OF LAW

1. The Board views sexual harassment, when proven in the governmental work place, as discrimination against harassed employees pursuant to KRS 18.310 (1) which states:

> "No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified

> service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions or affiliations or ethnic origin or sex or handicap . . ."

2. The Board adopted the following definition of sexual harassment on April 6, 1981, in the case of *Hester, et al.* v. *Barkley II, et al.:* unwelcome physical advances, requests for favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

> a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
>
> b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
>
> c. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

In determining whether alleged conduct constitutes sexual harassment, the hearing officer looked at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action must be made from the facts on a case-by-case basis.

3. The findings of fact in paragraph number 3 clearly show that Bob Barnes had engaged in sexual harassment of Jeanne H. Pherson in October of 1981 when Bob Barnes took her back to his office. His unwelcome physical advances were definitely sexual in nature, and it was clear that he expected submission to that conduct in exchange

for employment security, in that he offered her a job in his division. Jeanne Pherson did nothing to lead Bob Barnes on or to indicate that such advances would not be discouraged. Although she did not file a formal complaint against Bob Barnes for the incident in question, his conduct did interfere with her working environment in that from that day forward, she avoided Bob Barnes.

4. Bob Barnes engaged in sexual harassment of Anna Faye Katon in the summer of 1978 when he isolated her in his motel room and tried to take liberties. Had she not hidden under the desk, I'm sure appellant Barnes would have continued his unwelcomed, unencouraged advances. No employee for the Commonwealth has to subject themselves to such harassment. Faye was trying to protect herself yet she was afraid that her rejection of Bob Barnes would be used by him to place her with a poor vending stand. Although she resisted his advances, she did not report Bob Barnes' conduct for fear that she would end up being the one punished.

5. The incident described in paragraph 21 of the findings of fact was not as clear. The evidence presented made it sound like two separate incidents but the conflicting testimony appears to be two defenses to the same incident. I have no doubt that Bob Barnes showed up at Faye's wanting to spend the night. Obviously, he was not encouraged by Faye although he *may* have been by another employee of the Bureau. In any event, we know Faye was intimidated by Bob Barnes and didn't want to be alone with him. Only after Bob Barnes could not get Jim McCollum to pick him up did Faye allow Bob to stay. Again, she feared the authority of Bob Barnes and what might happen to her livelihood.

6. The proof of sexual harassment against Joe Thompson is another matter. Sexual harassment can be mere verbal conduct of a sexual nature. It is not necessary to

show any physical conduct. Joe Thompson was found to have not touched Libby Williams except to remove lint or dog hair. Libby consented and one time, as an afterthought, felt he may not have been acting benevolently. However, Joe's only conduct that is questioned by the hearing officer as to whether or not it constituted sexual harassment, is his constant verbal remarks that dealt with sex. Joe could tell many dirty jokes or twist the meaning of an innocent remark so that it had sexual connotations. Sexual harassment? No. Why? the atmosphere at the Brownsboro Road office was such that the comments offended no one. A great number of employees engaged in this conduct, even Libby Williams. Joe never made physical advances on Libby and when she felt he was getting too personal verbally, she was able to tell him and he stopped. Many times Libby initiated the conversation and then Joe may have had the decide when it should cease.

This is not to say that employees have to put up with dirty jokes or other comments of a sexual nature. However, once the employee starts, or approves the comments, he or she has the obligation or affirmative duty to make it known that such comments are becoming offensive. Testimony was introduced concerning certain employees that you didn't tell dirty jokes. This suggests that those employees didn't participate to begin with, or they made it known that it was offensive and it stopped.

7. Under 101 KAR 1:120 Section 1, the tenure of an employee with status is during good behavior and the satisfactory performance of his duties, with the burden of proving misconduct on the employer. See *Gross* v. *Personnel Board,* Ky., 456 S.W. 2d 824 (1970). Technically, Joe Thompson did not engage in sexual harassment. Also, Joe did perform satisfactorily as the vending machine repair supervisor although he performed more as a chief repairman. His duties as a training officer were way below stand-

ard and a disservice to the trainees as well as to the Bureau. Under the circumstances, KRS 18.210 (16) and 101 KAR 1:110 Section 3, permit an appointing authority to demote an employee where cause is found. Here it is clear to the hearing officer that the appellant received one promotion too many, one that he could not handle. Joe was a great repairman and would be an asset to the Bureau if utilized as such, but he is not a training officer.

8. Bob Barnes' continuing unsatisfactory performance of his duties was not clearly shown. Incidents of misconduct, such as the James McKeown incidents in paragraph 22 of the findings of fact, and the various drinking incidents were shown and suggest he could use improvement. On a day to day basis, I couldn't help feeling the job had many political considerations that would hinder performance. The James McKeown incidents concerning James Whitehouse' delinquent set-aside reports and applications for transfers suggest something less than dismissal if they stood alone and were against a classified employee. The drinking incidents after regular working hours reflected on the Bureau in that vendors had come to rely on getting some business accomplished at these visits. Again, as this relates to his unclassified position, we need not consider if cause existed for dismissal. Although unclassified personnel have no appeal rights if dismissed for unsatisfactory performance, if formerly a merit employee, upon dismissal, that employee reverts back to a merit or classified employee (KRS 18.140 (4) & 101 KAR 1:110, Section 1 (5)). Bob Barnes reverted to the classified service immediately when the Bureau itself determined to dismiss for unsatisfactory work and notified the appellant. Once back in classified service, an employee cannot be dismissed for unsatisfactory performance committed during the time in unclassified service. Sexual harassment is different and a finding of sexual harassment allows dismissal upon returning to

classified service in order to prevent a circumvention of KRS 18.310, and under corrective powers contained in KRS 18.170 (3) and KRS 18.270 where the victim of sexual harassment is a classified employee (Jeanne H. Pherson).

RECOMMENDED ORDER

It is hereby recommended to the full Board that the appeal of the appellant, Bob Barnes, be dismissed and his dismissal from classified service for sexual harassment be upheld.

It is further recommended to the full Board that the appeal of appellant, Joe Thompson, be sustained and that he receive any emoluments to which he is entitled. It is also recommended to the appointing authority that Mr. Thompson be considered for other positions than that of Training Officer upon his reinstatement or shortly thereafter.

It is further recommended that the Hearing Officer directs the Secretary to the Personnel Board to execute and transmit this Recommended Order on the Hearing Officer's behalf.

This 19th day of October, 1982

(s) Arthur Hatterick
Arthur Hatterick, Secretary
State Personnel Board

Copies to all parties or
attorneys of record.

Commonwealth of Kentucky

PERSONNEL BOARD

Appeal Nos. 82-95 & 82-96

ROBERT BARNES and
JOE THOMPSON - - - - - - - *Appellants*

v.

BUREAU FOR THE BLIND - - - - *Appellee*

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

* * * *

The above styled case was remanded to the hearing officer by the full Board at the November 12, 1982, Board Meeting for the submission of briefs and/or the taking of additional proof at the discretion of the Hearing Officer. The hearing officer, by interlocutory order, gave the parties ten days for the submission of briefs on the issues of law with an additional five days for reply briefs.

Upon a review of exceptions, responses, briefs, and selected portions of the record, the hearing officer amends the following findings.

AMENDED FINDINGS OF FACT

Exhibit *F*, not -E-, was sealed by the hearing officer to keep confidential client's names and that exhibit also forwarded to the Board.

6. Finding #6, the fifth paragraph, page 4, should be amended to read:

> "Robert Barnes stated that the atmosphere at the Breckinridge Lane Office was laid back or casual

and that there was always joking, and it was not that way just with Robert Barnes but with everyone that preceeded Mr. Barnes. Many of the jokes would be dirty jokes but they were told by everyone. Sexual matters were discussed *at the Brownsboro Road office* on occasion but Robert stated he didn't know how regular because he was not ~~always~~ *stationed* there. Robert Barnes testified that at one time he discussed the Alven Barkley sexual harassment case with Libby, and according to Robert Barnes, Libby stated the sexual harassment charges were silly."

14. Amend finding #14 to read:

"On March 16 or 17, 1982, Libby was standing in front of Joe Thompson's desk when Joe asked what the "A" stood for in Bob A. Barnes' name. Both Bob Barnes and Libby responded, "Allen" at which point Bob asked Joe what the "M" in Thompson stood for, to which *Bob* ~~Joe~~ stated, "It stands for mother fucker". Both Bob and Joe started laughing. Barnes and Thompson deny this incident but Libby Williams written records are more reliable." ~~Robert Barnes took no disciplinary action or verbal reprimand~~.

25. Finding 25, the second paragraph, page 11, shall read:

"Robert Barnes testified that he appointed Joe Thompson to the position of training officer after having offered it to a number of other individuals who declined. Joe was later ~~had already been~~ appointed supervisor of the repair section," ~~and agreed to take on this additional duty~~.

27. Finding 27, on pages 11 and 12 should read:

"Ken Boswell is employed with the Bureau for the Blind at 1900 Brownsboro Road and up until March of 1982, had been division director. Bob Barnes was his immediate supervisor. Mr. Boswell related an incident that occurred on election day in November of 1979. For purposes of these findings, the incident can be considered in Bob Barnes' case but not Joe Thompson's, in that the dismissal letter made no mention of the incident in Joe Thompson's letter of dismissal. Joe Thompson appeared to have had a bit to drink and was not up to par. There was a meeting going on concerning some coin mechs and Joe would leave the area and come back even more enebriated. Joe Thompson ordered a couple of coin mechs when Ken Boswell informed Joe that he did not have that authority. A discussion ensued ~~which resulted in Mr. Boswell being removed~~ and *eventually* Joe was placed in charge of Mr. Boswell. This hearing officer will not decide which individual should have been supervisor, as that is a management function, but doing nothing about the drinking was poor performance by Bob Barnes. Part of Bob's problem is the mistaken belief that an employee could not be disciplined for a drinking problem, and that an employer could never note that an employee had a drinking problem. He gave no basis for his opinion but stated it very confidently as if he had been told that by a supervisor."

AMENDED CONCLUSIONS OF LAW

4. Conclusion 4 is amended to incorporate part of conclusion 8 and will read:

"Bob Barnes engaged in sexual harassment of Anna Faye Katon in the summer of 1978 when he isolated her in his motel room and tried to take liberties. Had she not hidden under the desk, I'm sure the appellant Bob Barnes would have continued his unwelcomed, unencouraged advances. No quasi-employee for the Commonwealth has to subject themselves to such harassment. Faye was trying to protect herself yet she was afraid that her rejection of Bob Barnes would be used by him to place her with a poor vending stand. Although she resisted his advances, she did not report Bob Barnes' conduct for fear that she would end of being the one punished. Faye was not a merit employee but an independent contractor who had to measure up to the standards of the Bureau of the Blind to obtain a stand and her continued employment in the stand was up to the Bureau. Faye is not a pure independent contractor nor is she a state employee but better described as a quasi-employee, that is, subject to some rules and regulations but with some independence. The corrective powers of the Board contained in KRS 18.170 (3) and KRS 18.290 only protect classified employees against sexual harassment and therefore this incident cannot be considered a violation of KRS 18.310, discrimination against classified employees."

5. Amend conclusion 5 to add:

"For the reasons stated in paragraph 4 of the Conclusions of Law, this incident cannot be considered a violation of KRS 18.310 which prohibits sexual harassment against CLASSIFIED employees."

6. Amend conclusion 6 to add:

"The appellee contends the hearing officer used the wrong test as a fact finder by determining whether or not harassment existed in paragraph 4 instead of determining "whether or not the appointing authority had ample evidence to determine harassment did occur." Such a concept is contrary to an objective hearing to see if cause existed for disciplinary action. The appellee's test would make the Personnel Board an appellate Board when the appellee admits it has no hearing procedures prior to an appeal to the Board. KRS 18.270 gives the employee a right to a public hearing with the right to present evidentiary facts, and the Board makes findings concerning cause. What the statute contemplates is a de novo determination by weighing the evidence and finding the facts, and a determination as to whether or not the facts constitute harassment, not could the appellee have found it to be harassment. In order to take any disciplinary action the appointing authority had to make that determination. If the Board can't review that determination the Burden of proof would be on the employee to show cause did not exist which is contrary to *Gross* v. *Personnel Board,* Ky., 456 S.W. 2d 824 (1970). 101 KAR 1:130 Section 7(5) is the same as the statute and both allow the Board to review *all* circumstances which suggest the Board is not limited to reviewing the appointing authority's decision as "findings of fact." 101 KAR 1:130 Section 8 speaks of the Board's "findings of fact" and not a review of the sufficiency of appellee's evidence to support its disciplinary action.

Likewise the test concerning the facts in paragraph 8 of the findings of fact necessarily has to be whether

the appellant Joe Thompson was in reality about to touch Libby Williams. To fire an employee for another's unfounded fears is not discipline for cause. Penalization can only be for cause, not fears or a mere belief that cause exists. KRS 18.210 and 101 KAR 1:120."

7. Amend conclusion 7, add:

"Joe appears overburdened by performing the functions of both a training officer and supervisor of repairs. If he were assigned only as a training officer, he may be able to perform satisfactorily. Likewise, as only supervisor of repairs, he would appear to be able to perform well. However, it is a management decision on how much work to require of a position and the Board will not dictate duties and responsibilities except when one person is expected to assume more than most people can handle. The enourmous backlog of repairs and the shortage of repairman placed more than one individual's duties on Joe Thompson. Since he is only one person, something had to give and the training program suffered. This is not cause for dismissal but an indication that the appointing authority ought to reassign the training program or get help in the repair section. Once the positions are staffed, if the appellant, Joe Thompson still can't handle the job, then cause would exist for dismissal.

8. Conclusion 8 is deleted entirely and in its place, add:

"8. The tenure of a status employee is during good behavior and the satisfactory performance of his duties 101 KAR 1:120 Section 1. Bob Barnes was in an unclassified position when charged with sexual harassment and unsatisfactory work performance.

Although unclassified personnel had no appeal rights if dismissed, if formerly a classified employee, upon dismissal, that employee reverts back to a merit or classified employee (KRS 18.140(4) and 101 KAR 1:110 Section 1(5)). Bob Barnes reverted to the classified service immediately when the Bureau itself determined to dismiss and notified the appellant. Once back in classified service, an employee receives his reversionary rights or a right to an appeal. The dismissal from the classified position can only be allowed if the reasons or cause for dismissal from the unclassified service would constitute cause for dismissal from the classified position. Sexual harassment and intentional misleading Charles McDowell, etc. (paragraph 26 of the facts) (unsatisfactory performance) could be cause for dismissal of an Education Program Supervisor II. The only questions then before the Board being, A. Did cause exist; B. Did the appellee give adequate notice to the appellant in his dismissal letter; and C. Was the penalization excessive in light of all the surrounding circumstances.

The findings of fact, paragraphs 13, 14, and 15, combined with 18, and paragraph 3 as dismissed in the conclusions, paragraph 3, show Bob Barnes guilty of sexual harassment of classified employees as charged in the letter of dismissal. Classified employees can be discharged for sexual harassment per paragraph 1 of the Conclusions of Law.

The finding of fact paragraph 26 show the appellant, Bob Barnes, intentionally misled a superior concerning qualifications of a vendor. Deception is unsatisfactory work performance which would allow a classified employee to be terminated under 101 KAR 120 Section 1.

Additional incidents of unsatisfactory work performance mentioned in the letter of dismissal of April 30, 1982, which can be considered against the appellant, Bob Barnes, by authority of KRS 18.210 (16) and 101 KAR 1:120 Section 3, are found in the findings of facts, paragraphs 22, 23, 27 and 28.

The Board has the authority under KRS 18.270 and 101 KAR 1:130 Section 7(5) to alter, modify, or rescind disciplinary action if the Board finds the appointing authority's actions, considering all the circumstances, were erroneous or excessive. Considering all of the above circumstances, the dismissal does not appear to be erroneous, without cause, or excessive.

AMENDED RECOMMENDED ORDER

It is hereby recommended to the full Board that the appeal of the appellant, Robert (Bob) Barnes, be dismissed and his dismissal from classified service ~~for sexual harassment~~ be upheld.

It is further recommended to the full Board that the appeal of appellant, Joe Thompson, be sustained and the he receive any emoluments to which he is entitled. It is also recommended to the appointment authority that Mr. Thompson be considered for other positions than that of Training Officer upon his reinstatement or shortly thereafter.

December 8, 1982

(s) Wil Schroder
Wilfrid Schroder
Hearing Officer